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United States

Circuit Court of Appeals

For the Ninth Circuit.

TATSUUMA KISEN KABUSHIKI KAISHA, a Corporation of the Empire of Japan, Claimant of the Steamship "HAKUTATSU MARU," Her Engines, Apparel, etc.,

Appellant,

vs.

ROBERT DOLLAR COMPANY, a Corporation,

Appellee.

Apostles on Appeal.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

FILED
DEC 4 - 1928
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS OF RECORD.

Messrs. COSGROVE & TERHUNE, 2002 L. C. Smith Building, Seattle, Washington,

Messrs. McCAMANT & THOMPSON, American Bank Building, Portland, Oregon,

Proctors for Appellant.

Mr. JOHN AMBLER, Pacific Steamship Company Terminal, 1519 Railroad Avenue, So., Seattle, Washington.

In the District Court of the United States for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Apparel, etc.,
Respondent.

CAPTION PURSUANT TO ADMIRALTY RULE 4 OF CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

This suit was begun by the Robert Dollar Company, a corporation, libellant, against the SS. "Hakutatsu Maru," her engines, apparel, etc., the libel being filed in the above-entitled court. The

vessel was seized under a writ of attachment, and Tatsuuma Kisen Kabushiki Kaisha, as owner of the vessel, appeared in said cause, filed its claim and release bond, whereupon said vessel was released. No further change of parties has taken place, and no defendant was attached or arrested, bail taken or property attached or arrested except as hereinbefore stated; there was no reference to a commissioner.

The trial court, the Hon. John H. McNary, sustained the exceptions to claimant's amended answer to libelant's amended libel, and claimant refusing to plead further, a decree was entered in favor of libellant against claimant.

Pleadings were filed as follows:

Oct. 28, 1927. Libel (with stipulation for costs) filed and writ of attachment issued.

Oct. 31, 1927. Claim, stipulation for costs and release bond filed.

Jan. 5, 1928. Claimant's answer filed.

Jan. 10, 1928. Exceptions to claimant's answer filed.

Feb. 6, 1928. Opinion of Court upon exceptions to claimant's answer filed, and order allowing exceptions entered. [1*]

Jan. 15, 1928. Amended libel filed.

Feb. 15, 1928. Claimant's amended answer to amended libel filed.

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*Page-number appearing at the foot of page of original certified Apostles on Appeal.

April 12, 1928. Exceptions to amended answer filed.

June 4, 1928. Opinion of Court upon exceptions to claimant's amended answer filed, and order entered allowing exceptions.

Aug. 25, 1928. Declaration to further plead filed.

Sept. 18, 1928. Final decree filed.

Oct. 22, 1928. Notice of appeal filed.

Oct. 22, 1928. Appeal bond, approved by appellee, filed.

Oct. 22, 1928. Notice (showing service on appellee) of filing appeal bond filed.

Oct. 22, 1928. Assignment of errors filed.

Oct. 22, 1928. Praecipe for apostles on appeal filed. [2]

United States District Court for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Apparel, etc.,

Respondent.

LIBEL.

To the District Court of the United States for the District of Oregon:

The libel of the Robert Dollar Company against the Japanese steamship or vessel called the "Hakutatsu Maru," her tackle, apparel and furniture, and against all persons intervening for their interests therein, in a cause of contract, civil and maritime, alleges as follows:

I.

That libellant is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, in said state. That the SS. "Hakutatsu Maru" is a Japanese vessel, and is now within the port of Portland, Oregon, and within the jurisdiction of this Honorable Court.

II.

That on or about the 27th day of May, 1925, libellant delivered on board the SS. "Hakutatsu Maru," then lying in the port of Vancouver, British Columbia, and bound for the port of Hong Kong, China, 9,861 pieces of lumber, containing some 328,765 feet board measure, more or less, for transportation to the said port; that the said vessel duly accepted the said lumber and demanded for said transportation a certain freight rate, which libellant duly paid. [3]

III.

That the said shipment of lumber arrived in the port of Hong Kong on or about the 13th day of September, 1925; that libellant promptly demanded delivery of said lumber, but that said vessel refused to deliver same until libellant had paid an additional sum of $1,580.68; that libellant, finding that delivery of the lumber could only be effected by payment of the said amount, and being in immediate need of said lumber, paid the said amount under written protest on or about the 17th day of September, 1925.

IV.

That the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected, and libelant is informed and believes that the said vessel is about to leave this port and the United States, so that libellant will be without remedy unless by proceedings against said vessel, her tackle, apparel and furniture.

V.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

NOW, THEREFORE, libellant prays that process in due form of law according to the course of this court in cases of admiralty and maritime jurisdiction may issue against said vessel, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this Court would be pleased to de-

cree the payment of the amount hereinbefore set forth, with interest and costs, and that the said vessel, her tackle, apparel and furniture, may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the [4] premises as in law and justice it may be entitled to receive.

JOHN AMBLER,
Proctor for Libellant,
1519 Railroad Ave. So., Seattle, Washington.

State of Oregon,
County of Multnomah,—ss.

John Ambler, being duly sworn, on oath deposes and says, that the Robert Dollar Company is a California corporation, and is not engaged in business in the State of Oregon. That he is the true and lawful attorney for the said Robert Dollar Company; that he is familiar with the facts set forth in the foregoing libel, and the same are true as he verily believes. That he makes this verification for and on behalf of the Robert Dollar Company, being duly authorized so to do.

JOHN AMBLER.

Subscribed and sworn to before me this 28th day of October, 1927.

[Seal] FRANK L. BUCK,
Notary Public in and for the State of Oregon, Residing at Portland.

My commission expires October 21, 1928.

Filed October 28, 1927. [5]

[Title of Court and Cause.]

STIPULATION FOR RELEASE OF VESSEL.

WHEREAS, a libel has been filed in this Honorable Court by Robert Dollar Company, a corporation, against the steamship "Hakutatsu Maru," her engines, apparel, etc., for the reasons and causes in said libel mentioned, and

WHEREAS, a claim to the said vessel has been filed by Katsuuma Kisen Kaisha, a corporation organized under the laws of the Empire of Japan, the owner of said vessel, and the amount of recovery sought in said libel is the sum of One Thousand Five Hundred Eighty and 68/100 ($1,580.68) Dollars, together with interests and costs, and

WHEREAS, the vessel has been arrested under process issued in the above-entitled cause and her release from arrest is now desired by the aforesaid claimant,

NOW, THEREFORE, the condition of this stipulation is such that if the claimant herein and Standard Accident Insurance Company, a corporation organized and subsisting under the laws of the State of Michigan, shall abide by all the orders of the court, interlocutory or final, and shall pay the sum of One Thousand Five Hundred Eighty and 68/100 ($1,580.68) Dollars [6] or so much thereof as may be awarded by this court or by any appellate court if an appeal intervene, with interest, and shall also pay all costs and expenses and disbursements which may be awarded in favor of

libelant herein, then this stipulation shall be void; otherwise to remain in full force and virtue,

KATSUUMA KISEN KAISHA,
By McCAMANT & THOMPSON,
Its Proctors.

STANDARD ACCIDENT INSURANCE COMPANY,
Surety.
By A. D. TRUNKEY,
Attorney-in-fact.
By A. D. TRUNKEY,
Resident Agent.

[Seal of Surety Company.]

Approved Oct. 31, 1927.

R. S. BEAN,
Judge.

Filed November 1, 1927. [7]

[Title of Court and Cause.]

CLAIM.

And now before this Honorable Court appears Katsuuma Kisen Kaisha, a corporation organized and subsisting under the laws of the Empire of Japan, by Ralph H. King, its proctor, and claims the above-named ship and prays to defend this suit accordingly.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
RALPH H. KING,
Proctors for Claimant.

District of Oregon,—ss.

I, Ralph H. King, being duly sworn, depose and say that I am informed and aver the fact to be that Katsuuma Kisen Kaisha, a corporation organized and subsisting under the laws of the Empire of Japan, is the true and *bona fide* owner of the said steamship "Hakutascu Maru," against which the above suit has been commenced by Robert Dollar Company, a corporation, libelant; that for the purposes of making the above claim I am the agent of the aforesaid claimant and am duly authorized by it and on behalf of the said owner of said vessel to put in this claim. I [8] further say that at the commencement of this suit the above-named vessel was in the possession of Katsuuma Kisen Kaisha as one of its owners.

RALPH H. KING.

Subscribed and sworn to before me this 31st day of October, 1927.

[Seal] BORDEN WOOD,
Notary Public for Oregon.

My commission expires November 15, 1930.

Filed October 31, 1927.

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING JANUARY 5, 1928, FOR PLEADING, ETC.

Come now the above-named libelant, respondent

and claimant herein, and stipulate and agree as follows:

Notwithstanding the return date fixed in the attachment herein, the said respondent and claimant may have until January 5th, 1928, in which to further plead herein. [9]

It is further stipulated by and between the parties hereto that the vessel seized herein was the "Hakutatsu Maru" and the true claimant thereof Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan. The stipulation for the release of the vessel, the release bond and the claim therefor shall be deemed amended to show the true names of the vessel and the claimant as herein recited.

Dated this 14th day of November, 1927.

JOHN AMBLER,
Proctor for Libelant.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Respondent and Claimant.

Filed November 18, 1927.

In the District Court of the United States for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Apparel, etc.,
Respondent.

AMENDED LIBEL.

To the District Court of the United States for the District of Oregon:

The libel of the Robert Dollar Company against the Japanese steamship or vessel called the "Hakutatsu Maru," her tackle, apparel and furniture, and against all persons intervening for [10] their interests therein, in the cause of contract, civil and maritime, alleges as follows:

I.

That libellant is a corporation, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco, in said state. That the SS. "Hakutatsu Maru" is a Japaneses vessel, and is now within the port of Portland, Oregon, and within the jurisdiction of this Honorable Court.

II.

That on or about the 27th day of May, 1925, libellant delivered on board the SS. "Hakutatsu Maru," then lying in the port of Vancouver, British Columbia, and bound for the port of Hong Kong, China, 9,861 pieces of lumber, containing some 328,765 feet board measure, more or less, for transportation to the said port; that the said vessel duly accepted the said lumber and demanded for said transportation a certain freight rate, which libellant duly paid.

III.

That the said shipment of lumber arrived in the port of Hong Kong on or about the 13th day of September, 1925; that libellant promptly demanded delivery of said lumber, but that said vessel refused to deliver same until libellant had paid an additional sum of $1,580.68; that libellant, finding that delivery of the lumber could only be effected by payment of the said amount, and being in immediate need of said lumber, paid the said amount under written protest on or about the 17th day of September, 1925.

IV.

That the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected, and [11] libellant is informed and believes that the said vessel is about to leave this port and the United States, so that libellant will be without remedy unless by proceedings against said vessel, her tackle, apparel and furniture.

V.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

NOW, THEREFORE, libellant prays that process in due form of law according to the course of this court in cases of admiralty and maritime jurisdiction may issue against said vessel, her tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this court would be pleased to decree the payment of the amount herinbefore set forth, with interests and costs, and that the said vessel, her tackle, apparel and furniture, may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

JOHN AMBLER,
Proctor for Libellant,
1519 Railroad Avenue South,
Seattle, Washington.

State of Washington,
County of King,—ss.

John Ambler, being duly sworn, on oath deposes and says: That he is proctor for the Robert Dollar Company, libellant herein; that he has read the foregoing libel, knows the contents thereof, and that the same is true as he verily believes, the facts stated therein having been furnished to him by conversations had with, and documents received from, agents of the said [12] libellant. The rea-

son why this verification is not made by libellant is that it is a corporation of the State of California, with none of its officers in the State of Oregon.

JOHN AMBLER.

Subscribed and sworn to before me this 14th day of January, 1928.

[Seal] CARL STROUT,

Notary Public in and for the State of Washington, Residing in Seattle.

My commission expires Sept. 2, 1928.

Filed January 16, 1928.

[Title of Court and Cause.]

CLAIMANT'S AMENDED ANSWER.

To the Honorable Judge of the Above-entitled Court:

The amended answer of Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, claimant herein, to the [13] libel herein of Robert Dollar Company, libellant above named, respectfully shows:

I.

Answering Article I of said libel, claimant admits that the vessel "Hakutatsu Maru" is a Japanese vessel, and was, on the 28th day of October, 1927, within the jurisdiction of the above-entitled court; and claimant, lacking information or belief, denies each and every other allegation therein contained.

II.

Answering Article II of said libel, claimant admits each and every allegation therein contained, but alleges that said transportation was made pursuant to contract betwen libellant and claimant evidenced by a bill of lading, hereinafter more particularly referred to.

III.

Answering Article III of said libel, claimant admits that said shipment of lumber arrived at the Port of Hongkong on the vessel "Somedono Maru" (owned and operated by said claimant) on or about the 13th day of September, 1925; it admits further that libellant promptly demanded delivery of said lumber, but that said vessel "Somedono Maru" and said claimant refused to deliver the same until libellant had paid an additional sum of $1,580.68; it further admits that libellant paid said sum of $1,580.68 to the said claimant under written protest on or about the 17th day of September, 1925; that libellant denies each and every other allegation in said article contained.

IV.

Answering Article IV of said libel, claimant admits that said vessel has refused and still refuses to reimburse libellant for said $1,580.68, and admits that on the 28th day of October, 1927, said vessel was about to leave the Port of Portland, [14] Oregon, and the United States; and claimant denies each and every other allegation in said artcile contained.

V.

Answering Article V of said libel, the said claimant denies each and every allegation therein contained.

For a first affirmative defense, said claimant alleges:

I.

That if libellant's libel states a cause of action, it is not one cognizable in admiralty.

For a second affirmative defense, said claimant alleges:

I.

That the goods mentioned in said libel were shipped from Vancouver, B. C., in 1925, on said vessel "Hakutatsu Maru" for delivery at Hongkong, China, pursuant to an agreement between the said libellant and the said claimant, through its agents, Walker-Ross, Inc., as evidenced by a bill of lading dated May 27, 1925, issued by said claimant through its said agents (and accepted by said libellant), in favor of said libellant, providing for the carriage of said goods from said Vancouver, B. C., to Hongkong, China, all according to the terms and conditions particularly set forth in said bill of lading; that said agreement of transportation, as evidenced by said bill of lading, provided, among other things, the following:

> "8. If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the

same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first; all merchandise not discharged may be retained on board vessel [15] and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay."

II.

That said vessel "Hakutatsu Maru," shortly after May 27, 1925, sailed for Hongkong, China, and

while on said voyage, arrived at the port of Kobe, Japan, on the 29th day of June, 1925.

III.

That at the time said vessel arrived at Kobe and for some time prior thereto, a general strike existed in all Chinese ports, including the port of Hongkong; that in each of said ports said strike was of unusual violence and particularly directed towards British and Japanese vessels; that British and Japanese vessels arriving at said Chinese ports, including the said port of Hongkong, were unable to discharge their cargoes; that at said times there was in said ports, including Hongkong, much rioting, civil war chaos; that Kobe was on the usual and customary route of said vessel on the voyage from Vancouver, B. C., to Hongkong; that said Chinese ports, on account of said strikes, riots, civil war and chaos, being in effect closed, the said port of Kobe, upon the arrival of said vessel, was the only remaining near and safe port on said customary route [16] of said vessel at which the said vessel might land and store the said goods of said libellant.

That the ports of Shanghai and Kelung, Formosa, were somewhat nearer to the port of Hongkong than the port of Kobe, but said vessel would have had to widely deviate from her usual and customary route in order to reach said ports, and further, the charges for discharge, storage and loading of said cargo at each of said ports was many times more than the charges for the same service at Kobe; and therefore the said ports of Shanghai

and Kelung were not either at or near the said port of Hongkong.

That said general strike, rioting, warfare and chaos continued as stated above from June 29, 1925, to September 13, 1925.

IV.

That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding article; and because of said information it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge and storage of said goods than Kobe; that by reason of the foregoing the said vessel "Hakutatsu Maru" retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and [17] placed aboard the vessel "Somedono Maru" for shipment to Hongkong, China; that said last-mentioned vessel proceeded, arriving at the port of Hongkong, China, on the

13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel "Somedono Maru"; that the said goods were retained and stored in the port of Kobe as hereinbefore stated because of the above-mentioned reasons, and none other.

V.

By reason of the foregoing, said vessel "Hakutatsu Maru" and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or $1,580.68, which was the reasonable and necessary cost thereof.

VI.

That the said vessel "Hakutatsu Maru" and her owner, the claimant herein, upon paying said costs and expenses of discharge, lighterage, storage and reloading of said goods, acquired under said bill of lading a lien against said goods in the amount of said payments so made, and upon the arrival of said goods at Hongkong, China, the said "Somedono Maru" and the said claimant refused to deliver the same until they were reimbursed for said payments; that the payment which the said libellant made at Hongkong, and particularly referred to in Article III of its libel, was by way of reimbursement to said "Hakutatsu Maru" and her owners for said costs and expenses so paid by them, and in satisfaction of said lien against said goods, and not otherwise.

VII.

That neither the said vessel "Hakutatsu Maru" nor her owners, the said claimant, are indebted to the said libellant by [18] reason of said payment mentioned in said libel in the sum of $1,580.68, or in any sum at all.

VIII.

That at all the times herein mentioned, the said claimant, Tatsuuma Kisen Kabushiki Kaisha, was and now is a corporation of the Empire of Japan, and the owner and operator of said vessels "Hakutatsu Maru" and "Somedono Maru."

IX.

All and singular the premises are true.

WHEREFORE, claimant prays that said libel be dismissed with costs, and for such other and further relief as may seem agreeable to the Court.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Claimant.

State of Washington,
County of King,—ss.

Howard G. Cosgrove, being first duly sworn, on oath deposes and says: I am one of the proctors for Tatsuuma Kisen Kabushiki Kaisha, claimant herein; I have read the foregoing amended answer, know the contents thereof, and that the same is true to the best of my knowledge, information and belief; the sources of my knowledge or information are communications received from the claimant and its agents and an examination of

the papers relating to the matter in suit. The reason why this verification is not made by said claimant is that it is a corporation of Japan, with none of its officers in either the States of Oregon or Washington.

HOWARD G. COSGROVE.

Subscribed and sworn to before me this 14th day of February, 1928.

[Seal] ROBERT S. TERHUNE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed February 15, 1928. [19]

[Title of Court and Cause.]

EXCEPTIONS TO CLAIMANT'S AMENDED ANSWER.

The libelant above named hereby excepts to the amended answer of Tatsuuma Kisen Kabushiki Kaisha, claimant herein, upon the following grounds:

I.

Paragraph 8 of the bill of lading, quoted in claimant's so-called second affirmative defense, is inapplicable to the facts set forth in paragraphs 2, 3, 4, 5, and 6 of its said second affirmative defense, in that paragraph 8 of the said bill of lading contemplated that the SS. "Hakutatsu Maru" would actually proceed to the port of delivery. Said paragraph 8 of the said bill of lading cannot

be invoked by said vessel, her master or owner, where the said vessel has utterly failed to proceed to the port of delivery, and the discretion therein contemplated cannot be invoked unless and until said vessel be at said port of delivery.

Libelant therefore excepts to the said so-called second affirmative defense, and prays that said claimant may be obliged to file a further answer to the said libel.

JOHN AMBLER,
Proctor for Libelant.
1519 Railroad Avenue South,
Seattle, Washington.

Filed April 12, 1928. [20]

[Title of Court and Cause.]

OPINION ON EXCEPTIONS TO CLAIMANT'S ANSWER.

February 6, 1928.

McNARY, District Judge.—If the facts set forth in the answer of claimant are true, it appears that the master of the vessel determined, while at Kobe, Japan, that it would be unsafe to deliver his cargo at Hongkong. The question for determination is whether Kobe can be regarded as near the port of delivery within the meaning of the bill of lading.

This is a case where the vessel entered into an agreement to deliver a cargo at a port in the

Orient at a time and place where the hazards of the undertaking were unusual. Therefore, in construing the contract, the Court should look to the language employed and the conditions that were obviously anticipated by the parties at the time the contract was made.

The port of Kobe was more than one thousand miles from the port of delivery.

If Kobe was the nearest port at which delivery of the cargo could have been made, it would, in my judgment, be near the port of delivery as intended by the parties. However, there are ports in China—Shanghai and several others—where possible delivery [21] might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer.

The contract contemplates that the shipper shall suffer as little inconvenience and expense as possible by reason of existing conditions.

There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. It is merely set forth that the strike at Hongkong was widespread, and that much rioting, civil war and chaos existed in China. This allegation might be generally true, and it yet be true that the cargo might have been safely discharged at

one of the ports referred to, in which event it would have been the duty of the master of the ship to discharge the cargo at the nearest port.

The exceptions to claimant's answer will be allowed.

Filed February 6, 1928. [22]

[Title of Court and Cause.]

OPINION ON EXCEPTIONS TO CLAIMANT'S AMENDED ANSWER.

McNARY, District Judge (Orally).—This cause of action arises out of a maritime contract, and it is the subject of admiralty jurisdiction. The bill of lading provides:

> "If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged," etc.

The amended answer sets forth that there was a general strike in all Chinese ports, including the port of Hongkong; that in each of said ports rioting, strikes and civil war existed, and that such

violence was particularly directed toward British and [23] Japanese vessels; that upon the arrival of the "Hakutatsu Maru" at the port of Kobe, Japan, the master thereof made due inquiry, and was informed of the existence of conditions at Hongkong and all other Chinese ports, and because of said information it was his judgment that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of the cargo, and as a consequence the cargo was discharged at Kobe, Japan.

The bill of lading expressly authorized the master to exercise his judgment as to the safety of landing the cargo only after the ship had arrived at Hongkong. The parties contemplated that the vessel should proceed to Hongkong and ascertain conditions before the master would be permitted to use his discretion as to the advisability of landing his cargo elsewhere.

This opinion may be inconsistent with my former holding, but, after further consideration of the bill of lading, I am convinced that it will bear no different interpretation from the one now given.

The exceptions to the amended answer will be allowed.

Filed June 4, 1928. [24]

AND AFTERWARDS, to wit, on Monday, the 4th day of June, 1928, the same being the 76th judicial day of the regular March term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [25]

[Title of Cause.]

MINUTES OF COURT—JUNE 4, 1928—ORDER ALLOWING EXCEPTIONS.

This cause was heard by the Court on the exceptions to the amended answer of the claimant herein, and was argued by Mr. John Ambler, of proctors for libelant, and Mr. Howard S. Cosgrove and Mr. Ralph H. King, of proctors for claimant. Upon consideration whereof,

IT IS ORDERED that said exceptions be and they are hereby allowed. [26]

[Title of Court and Cause.]

DECLINATION TO PLEAD FURTHER.

To the Libelant Above Named, and to Its Proctor, John Ambler:

The claimant above named stands on its present pleadings, and declines to plead further.

Dated at Seattle, Wash., this 16th day of August, 1928.

COSGROVE & TERHUNE,
Proctors for Claimant.

Filed August 25, 1928. [27]

AND AFTERWARDS, to wit, on Tuesday, the 18th day of September, 1928, the same being the 58th judicial day of the regular July term of said court,—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [28]

In the District Court of the United States for the District of Oregon.

No. A.—10237.

ROBERT DOLLAR COMPANY, a Corporation,
Libellant,

vs.

SS. "HAKUTATSU MARU," Her Engines, Apparel, etc.,
Respondent;

TATSUUMA KISEN KABUSHIKI KAISHA, a Corporation of the Empire of Japan,
Claimant.

FINAL DECREE.

This case having been heard on libellant's exceptions to claimant's amended answer, and having

been fully argued and submitted to the Court, and the Court having allowed the exceptions to the amended answer and the claimant and respondent having refused to plead further,—

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT:

1. That the libellant recover against Tatsuuma Kisen Kabushiki Kaisha claimant herein, the sum of $1,580.68, with interest at the rate of 6 per cent per annum from September 13, 1925, together with its costs herein to be taxed.

Done in open court this 18th day of September, 1928.

JOHN H. McNARY,
District Judge.

O. K. as to form. Aug. 22, 1928.

COSGROVE & TERHUNE,
Proctors for Claimant.

O. K. as to form. Aug. 23, 1928.

JOHN AMBLER,
Proctor for Libellant.

Filed September 18, 1928. [29]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Robert Dollar Company, a Corporation, Libellant and Appellee, and to John Ambler, Its Proctor:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the claimant and appellant

above named hereby appeals from the decision (and each and every part thereof) of the Court filed June 4, 1928, sustaining libellant's exceptions to claimant's amended answer to the amended libel; and also appeals from the final decree (and each and every part thereof) made and entered herein in favor of libellant and against the said claimant on the 18th day of September, 1928; said appeals being to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit in the City of San Francisco, California.

Dated at Seattle, Wash., this 19th day of October, 1928.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Claimant and Appellant.

Copy of within notice received and due service of same is acknowledged this 19th day of October, 1928.

JOHN AMBLER,
Proctor for Libellant and Appellee.

Filed October 22, 1928. [30]

AND AFTERWARDS, to wit, on Monday, the 22d day of October, 1928, the same being the 86th judicial day of the regular July term of said court,—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [31]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 22, 1928—ORDER FIXING AMOUNT OF APPEAL AND SUPERSEDEAS BOND.

This cause coming regularly on before the Court, the claimant above named having appealed to the Circuit Court of Appeals for the Ninth Circuit from the decision of the Court sustaining libelant's exceptions to claimant's amended answer to the amended libel, and from the decree of the Court entered herein, and having requested the Court to fix the amount of the appeal and supersedeas bond; and it appearing to the Court that it has in its custody and control a release bond of the said claimant in the sum of $1,580.68, and all things being considered:

The Court does hereby fix said appeal and supersedeas bond at $1200.00.

Done in open court this 22d day of October, 1928.

R. S. BEAN,
Judge.

Approved in the sum of $1200.00.

JOHN AMBLER,
Proctor for Appellee.

Filed October 22, 1928. [32]

[Title of Court and Cause.]

BOND ON APPEAL AND SUPERSEDEAS.

KNOW ALL MEN BY THESE PRESENTS, That we, Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, as principal, and Standard Accident Insurance Co., of Detroit, Michigan, a corporation of the State of Michigan, as surety, are held and firmly bound unto Robert Dollar Company, a corporation, in the sum of $1,200.00, to be paid to the said Robert Dollar Company, its successors and assigns, for the payment of which well and truly to be made, we bind ourselves, and each of us, and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of October, 1928.

WHEREAS, the said Tatsuuma Kisen Kabushiki Kaisha, as claimant of the steamer "Hakutatsu Maru," has appealed to the Circuit Court of Appeals for the Ninth Circuit from a decision of the District Court of the United States, for the District of Oregon, filed in said District Court on June 4, 1928, sustaining libellant's exceptions to claimant's amended answer to the [33] amended libel; and also has appealed from the final decree of said District Court made and entered in favor of libellant and against the said claimant on the 18th day of September, 1928; and

WHEREAS, the said Tatsuuma Kisen Kabushiki Kaisha desires, during the progress of such appeal,

to stay the execution of the said decree of the District Court;

NOW, THEREFORE, the condition of this obligation is such that the above-named appellant, Tatsuuma Kisen Kabushiki Kaisha, shall prosecute said appeal with effect and pay all costs which may be awarded against it as such appellant, if the appeal is not sustained, and shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, or on the mandate of said Court by the Court below, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated this 22d day of October, 1928.

TATSUUMA KISEN KABUSHIKI KAISHA.

By G. R. WALKER,
Its Agent.

STANDARD ACCIDENT INSURANCE CO. OF DETROIT, MICHIGAN.

[Seal] By EVART LAMPING,
Its Attorney-in-fact.

Taken and acknowledged before me this 22d day of October, 1928.

[Seal] HOWARD G. COSGROVE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Approved this 22d day of October, 1928, as to form, amount and surety.

JOHN AMBLER,
Proctor for Libellant and Appellee.

R. S. BEAN,
Judge.

Filed October 22, 1928. [34]

[Title of Court and Cause.]

NOTICE OF FILING BOND ON APPEAL.

To Robert Dollar Company, a Corporation, Appellee, and to John Ambler, Its Proctor:

You and each of you will please take notice that the above-named appellant has this day filed in the office of the Clerk of the above-entitled District Court, its bond on its appeal herein; said bond being executed by Standard Accident Insurance Co. of Detroit, Michigan, as surety; that said surety is a corporation duly organized under the laws of the State of Michigan, and doing business in the State of Washington, with the agent executing such bond residing and doing business at Seattle, Washington.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Appellant.

Copy of within notice received and due service of same is acknowledged this 22d day of October, 1928.

JOHN AMBLER,
Proctor for Appellee.

Filed October 22, 1928. [35]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Tatsuuma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, the appellant herein, and assigns the following errors in the decision and decree to be reviewed on appeal by the Circuit Court of Appeals for the Ninth Circuit in said cause, to wit:

1. The District Court erred in sustaining the exceptions to the amended answer to the amended libel.

2. The District Court erred in making and entering its final decree in favor of libellant and against the said claimant on the 18th day of September, 1928.

Dated this 19th day of October, 1928.

Respectfully submitted,
COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Appellant.

Copy of within assignment of errors received and due service of same is acknowledged this 19th day of October, 1928.

JOHN AMBLER,
Proctor for Appellee.

Filed October 22, 1928. [36]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To the Clerk of the District Court of the United States for the District of Oregon:

You will please prepare and return in behalf of the said appellant, in accordance with the statutes and rules of said Circuit Court of Appeals for the Ninth Circuit, apostles on appeal herein, including:

1. Libel.
2. Release bond.
3. Claim.
4. Stipulation extending time for pleading, etc.
5. Amended libel.
6. Claimant's amended answer.
7. Exceptions to claimant's amended answer.
8. Decision sustaining exceptions to claimant's answer.
9. Decision sustaining exceptions to claimant's amended answer.
10. Declination to plead further.
11. Final decree.
12. Notice of appeal.

13. Order fixing amount of appeal and supersedeas bond.
14. Bond on appeal.
15. Notice of filing bond on appeal.
16. Assignment of errors.
17. This praecipe.
18. A caption pursuant to subdivision i of Admiralty Rule 4 of said Circuit Court.

COSGROVE & TERHUNE,
McCAMANT & THOMPSON,
Proctors for Appellant.

Filed October 22, 1928. [37]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from one to thirty-seven, inclusive, constitute the apostles on appeal from a final decree in said court in a case in which Tatsumma Kisen Kabushiki Kaisha, a corporation of the Empire of Japan, claimant of the SS. "Hakutatsu Maru," her engines, apparel, etc., is appellant and Robert Dollar Company, a corporation, is libelant and appellee; that the said apostles have been prepared by me in accordance with the rules of court and the praecipe filed by the appellant and contain a full, true and

complete transcript of the record and proceedings had in said court in said cause which the said rule and the said praecipe direct shall be included therein, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing apostles is $5.60, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 25th day of October, 1928.

[Seal] G. H. MARSH,
Clerk. [38]

[Endorsed]: No. 5633. United States Circuit Court of Appeals for the Ninth Circuit. Tatsuuma Kisen Kabushiki Kaisha, a Corporation of the Empire of Japan, Claimant of the Steamship "Hakutatsu Maru," Her Engines, Apparel, etc., Appellant, vs. Robert Dollar Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed November 19, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5633 (In Admiralty)

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA, a corporation of the Empire of Japan,
Appellant,

—vs.—

ROBERT DOLLAR COMPANY, a corporation,
Appellee.

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLANT

COSGROVE & TERHUNE,
2002 L. C. Smith Building,
Seattle, Washington.

MCCAMANT & THOMPSON,
American Bank Bldg.,
Portland, Oregon,
Proctors for Appellant.

THE ARGUS, SEATTLE

FILED
DEC 26 1928
PAUL P. O'BRIEN,

No. 5633 (In Admiralty)

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA, a corporation of the Empire of Japan,
Appellant,

—VS.—

ROBERT DOLLAR COMPANY, a corporation,
Appellee.

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLANT

COSGROVE & TERHUNE,
2002 L. C. Smith Building,
Seattle, Washington.

MCCAMANT & THOMPSON,
American Bank Bldg.,
Portland, Oregon,
Proctors for Appellant.

THE ARGUS, SEATTLE

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA, a corporation of the Empire of Japan,

Appellant,

—VS.—

ROBERT DOLLAR COMPANY, a corporation,

Appellee.

No. 5633

(In Admiralty)

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLANT

STATEMENT OF THE CASE

About October 28, 1927, libellant filed in the lower court its libel in an action in rem against the steamer "HAKUTATSU MARU", her engines, boilers, etc. (Apostles p. 3). The vessel being attached, her owner, Tatsuuma Kisen Kabushiki Kaisha, appeared claiming said vessel and giving a release bond therefor. On June 4, 1928, the court sustained libellant's exceptions (Apostles p. 22) to claimant's amended answer

(Apostles p. 14). [Previously, on February 6, 1928, the court had sustained libellant's similar exceptions to claimant's answer (Apostle p. 23).] The claimant refusing to plead further, a decree was entered on September 18, 1928, in favor of the libellant against claimant (respondent) in the sum of $1580.68, with interest and costs (Apostles p. 28). From such decree this appeal is prosecuted.

The libel asserts that the libellant, on May 27, 1925, shipped on the "HAKUTATSU MARU" a certain lumber cargo from the port of Vancouver, British Columbia, to the port of Hongkong, China, with freight prepaid; that the lumber arrived at Hongkong about the 13th of September, 1925; that libellant demanded delivery

> "but said vessel refused to deliver same until an additional sum of $1580.68 was paid;"

that libellant paid said amount under written protest on or about the 17th of September, 1925;

> "that the said vessel has refused and still refuses to reimburse libellant for the amount thus wrongfully collected."

The prayer is for a money decree against the "HAKUTATSU," her attachment and sale.

The amended answer (Apostles p. 14, *et seq.*) makes certain denials and sets up the two following separate affirmative defenses:

> "First Affirmative Defense
>
> "That if libellant's libel states a cause of action, it is not one cognizable in admiralty.
>
> Second affirmative defense

I.

"That the goods mentioned in said libel were shipped from Vancouver, B. C., in 1925, on said vessel 'HAKUTATSU MARU' for delivery at Hongkong, China, pursuant to an agreement between the said libellant and the said claimant, through its agent, Walker-Ross, Inc., as evidenced by a bill of lading dated May 27, 1925, issued by said claimant through its said agents (and accepted by said libellant), in favor of said libellant, providing for the carriage of said goods from said Vancouver, B. C., to Hongkong, China, all according to the terms and conditions particularly set forth in said bill of lading; that said agreement of transportation as evidenced by said bill of lading, provided, among other things, the following:

" '8. If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first; all merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any

other port and thence to said port of delivery; or, second, same may be forwarded to and landed and delivered or stored at any other port at owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay.'

II.

"That said vessel 'HAKUTATSU MARU,' shortly after May 27, 1925, sailed for Hongkong, China, and while on said voyage, arrived at the port of Kobe, Japan, on the 29th day of June, 1925.

III.

"That at the time said vessel arrived at Kobe and for some time prior thereto, a general strike existed in all Chinese ports, including the port of Hongkong; that in each of said ports said strike was of unusual violence and particularly directed towards British and Japanese vessels; that British and Japanese vessels arriving at said Chinese ports, including the said port of Hongkong, were

unable to discharge their cargoes; that at said times there was in said ports, including Hongkong, much rioting, civil war and chaos; that Kobe was on the usual and customary route of said vessel on the voyage from Vancouver, B. C., to Hongkong; that said Chinese ports, on account of said strikes, riots, civil war and chaos, being in effect closed, the said port of Kobe, upon the arrival of said vessel, was the only remaining near and safe port on said customary route of said vessel on which the said vessel might land and store the said goods of said libellant.

"That the ports of Shanghai and Kelung, Formosa, were somewhat nearer to the port of Hongkong than the port of Kobe, but said vessel would have had to widely deviate from her usual and customary route in order to reach said ports, and further, the charges for discharge, storage and loading of said cargo at each of said ports was many times more than the charges for the same service at Kobe; and therefore the said ports of Shanghai and Kelung were not either at or near the said port of Hongkong.

"That said general strike, rioting, warfare and chaos continued as stated above from June 29, 1925, to September 13, 1925.

IV.

"That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding articles; and because of said infor-

mation it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge and storage of said goods than Kobe; that by reason of the foregoing the said vessel 'HAKUTATSU MARU' retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and placed aboard the vessel "SOMEDONO MARU' for shipment to Hongkong, China; that said last mentioned vessel proceeded, arriving at the port of Hongkong, China, on the 13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel 'SOMEDONO MARU;' that the said goods were retained and stored in the port of Kobe as hereinbefore stated because of the above mentioned reasons, and none other.

V.

"By reason of the foregoing, said vessel 'HAK-

utatsu Maru' and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or $1580.68, which was the reasonable and necessary cost thereof.

VI.

"That the said vessel 'Hakutatsu Maru' and her owner, the claimant herein, upon paying said costs and expenses of discharge, lighterage, storage and reloading of said goods, acquired under said bill of lading a lien against said goods in the amount of said payments so made, and upon the arrival of said goods at Hongkong, China, the said 'Somedono Maru' and the said claimant refused to deliver the same until they were reimbursed for said payments; that the payment which the said libellant made at Hongkong, and particularly referred to in Article III of its libel, was by way of reimbursement to said 'Hakutatsu Maru' and her owners for said costs and expenses so paid by them, and in satisfaction of said lien against said goods, and not otherwise.

VII.

"That neither the said vessel 'Hakutatsu Maru' nor her owners, the said claimant, are indebted to the said libellant by reason of said payment mentioned in said libel in the sum of $1580.68, or in any sum at all.

VIII.

"That at all the times herein mentioned, the

said claimant, Tatsuuma Kisen Kabushiki Kaisha, was and now is a corporation of the Empire of Japan, and the owner and operator of said vessels 'HAKUTATSU MARU' and 'SOMEDONO MARU.'

IX.

"All and singular the premises are true."

Libellant's exceptions to claimant's amended answer (Apostles p. 22) follow:

I.

"Paragraph 8 of the bill of lading, quoted in claimant's so-called second affirmative defense, is inapplicable to the facts set forth in paragraphs 2, 3, 4, 5 and 6 of its second affirmative defense, in that paragraph 8 of said bill of lading contemplated that the SS. 'HAKUTATSU MARU' would actually proceed to the port of delivery. Said paragraph 8 of the said bill of lading cannot be invoked by said vessel, her master or owner, where the said vessel has utterly failed to proceed to the port of delivery, and the discretion therein contemplated cannot be invoked unless and until said vessel be at said port of delivery.

"Libellant therefore excepts to the said so-called second affirmative defense, and prays that said claimant may be obliged to file a further answer to the said libel."

The court's oral decision sustaining exceptions (June 4,1928) is as follows (Apostles p. 25):

"This cause of action arises out of a maritime

contract, and it is the subject of admiralty jurisdiction. The bill of lading provides:

" 'If vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at the said port or for same to be there safely landed if discharged,' etc.

"The amended answer sets forth that there was a general strike in all Chinese ports, including the port of Hongkong; that in each of said ports rioting, strikes and civil war existed, and that such violence was particularly directed toward British and Japanese vessels; that upon the arrival of the 'HAKUTATSU MARU' at the port of Kobe, Japan, the master thereof made due inquiry, and was informed of the existence of conditions at Hongkong and all other Chinese ports, and because of said information it was his judgment that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of the cargo, and as a consequence the cargo was discharged at Kobe, Japan.

"The bill of lading expressly authorized the master to exercise his judgment as to the safety of landing the cargo only after the ship had ar-

rived at Hongkong. The parties contemplated that the vessel should proceed to Hongkong and ascertain conditions before the master would be permitted to use his discretion as to the advisability of landing his cargo elsewhere.

"This opinion may be inconsistent with my former holding, but, after further consideration of the bill of lading, I am convinced that it will bear no different interpretation from the one now given.

"The exceptions to the amended answer will be allowed."

A previous decision of the court (February 6, 1928) on similar exceptions to claimant's similar affirmative defense set forth in its answer, follows (Apostles p. 23):

"If the facts set forth in the answer of claimant are true, it appears that the master of the vessel determined, while at Kobe, Japan, that it would be unsafe to deliver his cargo at Hongkong. The question of determination is whether Kobe can be regarded as near the port of delivery within the meaning of the bill of lading.

"This is a case where the vessel entered into an agreement to deliver a cargo at a port in the Orient at a time and place where the hazards of the undertaking were unusual. Therefore, in construing the contract, the Court should look to the language employed and the conditions that were obviously anticipated by the parties at the time the contract was made.

"The port of Kobe was more than one thousand mile from the port of delivery.

"If Kobe was the nearest port at which delivery of the cargo could have been made, it would, in my judgment, be near the port of delivery as intended by the parties. However, there are ports in China—Shanghai and several others—where possible delivery might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer.

"The contract contemplates that the shipper shall suffer as little convenience and expense as possible by reason of existing conditions.

"There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. It is merely set forth that the strike at Hongkong was widespread, and that much rioting, civil war and chaos existed in China. This allegation might be generally true, and it yet be true that cargo might have been safely discharged at one of the ports referred to, in which event it would have been the duty of the master of the ship to discharge the cargo at the nearest port.

"The exceptions of claimant's answer will be allowed."

ASSIGNMENT OF ERRORS (Apostles p. 35)

(1) The District Court erred in sustaining the exceptions to claimant's amended answer to the amended libel.

(2) The District Court erred in making and entering its final decree in favor of libellant and against claimant on the 18th day of September, 1928.

ARGUMENT

The Amended Answer Cures Defects of Original Answer

The original answer, in Paragraph I of the affirmative defense thereof, sets up the bill of lading, and particularly Article 8 thereof. In Paragraph III of said affirmative defense, claimant alleged, among other things, the general strike, riot, violence, etc., directed toward British and Japanese vessels at the port of Hongkong, notice thereof to the master at the time of the arrival of the vessel at Kobe, the necessity for discharge and the resulting charges caused thereby. The court, in passing upon exceptions directed to this affirmative defense (Apostles p. 23), stated that

> "there are ports in China—Shanghai and several others—where possibly delivery might have been made. If the cargo could have been discharged at one of these ports, Kobe would not be near the point of delivery. In other words, it would have been the duty of the master of the ship at the time to discharge the cargo at the nearest safe port to Hongkong. Whether or not Kobe was the nearest safe port is not disclosed by the claimant's answer. * * * There are no definite allegations in the answer to the effect that ports nearer Hongkong than Kobe were unsafe for the discharging of the cargo. * * *"

After the opinion above mentioned was rendered, the claimant filed its amended answer, upon which

it stood. It sets up allegations which meet all of the objections voiced by the court.

In addition to the foregoing it will be noticed that the vessel when at Kobe was on her usual route, and to have gone to other ports than those on her usual route would have been to effect a deviation, which, in itself, under well-known rules of law, would have destroyed the carrier's right of all defenses under its bill of lading. The carrier owed to all shippers of cargo on the vessel, including the libellant, the duty of proceeding to destination along the usual and customary route. This did not admit of deviation.

As to the Jurisdiction of the Court—Brought to the Attention of the Court Through Claimant's First Affirmative Defense to Said Amended Libel.

This defense is:

> "that if libellant's libel states a cause of action, it is not one cognizable in admiralty."

The action is in admiralty in rem, and running directly against the "Hakutatsu Maru." There is no action in personam. The court sitting in admiralty has no jurisdiction over any causes of action except those which are maritime.

In the case of *The T. W. Lake*, decided by the Circuit Court of Appeals for the 9th Circuit, 1927 A. M. C. 57, we find the court dismissing for want of jurisdiction in admiralty a libel in personam brought upon two policies of insurance—one upon the hull of the vessel, upon which the appellant had paid a certain sum, and the other a policy covering marine risks for

disbursements and/or earnings, upon which the appellant had paid a certain sum. The libel alleged that the vessel so insured was, with the privity of the insured, sent to sea in an unseaworthy condition, and because of such she sank and became a total loss, and that the appellant paid said sums without knowledge or means of knowing that said vessel was sent to sea in an unseaworthy state and upon the representation of appellee that it had complied with all of the provisions of the policies and the law applicable thereto, etc., and in ignorance, misapprehension, misinformation and a mistake of the true fact paid said losses, and that the appellee held said sums to the appellant's use as and for money had and received. The court said:

> "Jurisdiction in admiralty in cases of contract depends upon the nature of the contract 'and is limited to contracts, claims and services purely maritime, and touching the rights and duties appertaining to commerce and navigation.' "

The court pointed out that although a contract of marine insurance is a maritime contract, a contract to procure such insurance is not enforcable in admiralty; that a contract by carrier by water to procure insurance on goods received for transportation is not a maritime contract. It quoted from Judge Story, *Plummer v. Webb*, 4 Mass. 380:

> "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

It pointed out that an action to reform a policy of marine insurance is without the jurisdiction of admiralty, and said:

> "Courts of admiralty cannot entertain an original bill or libel for specific performance to correct a mistake, or to grant relief against a fraud."

It referred to *United Transportation & Lighterage Co. v. New York & Baltimore Transportation Line*, 185 Fed. 386, saying:

> "It was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counterclaim for damages on account of excessive charges paid to libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that the respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime * * *' * * * The appellant admits that its causes of action are in the nature of assumpsit for money had and received, and contends that while it is true that the libel alleges that the appellee made incorrect proofs of loss and that the payments were made under 'misapprehension, misinformation, mistake and ignorance of the facts,' those allegations are not the basis of the causes of action but are inserted to show admiralty jurisdiction in that the question of the right to recover involves the con-

> struction of maritime contracts and the application of principles of maritime law."

The court held that it did not have jurisdiction, the cause being essentially one at law.

In *Boera Brothers v. U. S.*, 1924 A. M. C. 1474, decided by the United States District Court, Eastern District of New York, it appears that the shipper, which was the libellant, shipped on the steamer of the claimant certain goods, and the libellant was obliged to pay the claimant, under duress, mistake of fact and under protest, wharfage, which the carrier alleged to be due on certain of the goods shipped. The action was for the recovery of the money so paid. Claimant excepted, asserting that the cause of action was not within the admiralty maritime jurisdiction. The court said:

> "There can be no question raised as to the right to sue in admiralty for wharfage, but this is not a suit for wharfage, but a suit to recover money alleged to have been paid for wharfage under duress, mistake of fact and under protest, when the respondent was not entitled to any wharfage on certain specified crates. The libellants are not asking to enforce a maritime contract, nor to obtain an accounting as incident to a maritime contract, nor are there any allegations contained in the libel, which, in my opinion, are sufficient to give an admiralty court jurisdiction of the cause of action for the recovery of said money."

The exception was sustained.

In the *New York & Baltimore Transp. Line*, *Supra*, the court said:

"Perhaps, as we have also seen, an action in assumpsit for money had and received would lie. But a court of admiralty cannot afford the necessary equitable relief; nor can it grant the legal relief, because the implied promise to repay the moneys which cannot in good conscience be retained—necessary to support the action for money had and received—is not a maritime contract."

Libellant, having selected its forum, chosen its adversary and alleged certain particular facts and prayed for a money judgment, cannot upon exceptions to an answer change the form of action, forum or pick a new adversary. The libel asserts an action in assumpsit as for money had and received, the same being a cause of action foreign to the admiralty court. Because the bill of lading might come in for construction, the cause of action does not necessarily become maritime, as shown in the decision of Judge Story in *Plummer v. Webb, Supra.* Furthermore, this action is in rem against the "HAKUTATSU MARU" notwithstanding the fact that the allegations of wrong, overcharge, claim for money had and received, or whatever they may be, must be laid to the "SOMEDONO MARU" or to the carrier (which are individuals not parties hereto), but not to the "HAKUTATSU MARU." *There is no claim for damages because of the discharge, storage and placement of the goods upon the vessel* "SOMEDONO MARU." The action is as stated—one for money had and received, which having and receiving took place at Hongkong on the arrival of the "SOME-

DONO MARU." The allegations of the libel show no lien in the libellant against the vessel "HAKUTATSU MARU" on account of the claimed overcharges at Hongkong.

SECOND AFFIRMATIVE DEFENSE

For a better understanding of Paragraph 8 of the bill of lading we divide the same into what we deem to be its component parts, giving to the first two portions the designations (a) and (b).

> (a) "If the vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival *at or near* the same, or from discharging any or all of said merchandise, * * *
>
> (b) "Or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged,
>
> * * *
>
> "All merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owner's cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at Owner's cost, and risk, and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchan-

dise or any part thereof be so returned to such port of original shipment no additional freight shall be charged."

Paragraph III of the second affirmative defense states that a general strike, rioting, civil war and chaos existed in all Chinese ports, including Hong-kong, at the time said vessel arrived at Kobe on September 13, 1925, and that British and Japanese vessels arriving at Hongkong were unable to discharge their cargoes. That was a constructive prevention of the vessel from discharging at Hongkong or any other Chinese ports all or any of said merchandise, and likewise was a constructive prevention of the vessel from entering said port of delivery, all under said Sub-division (a) of Paragraph 8 of said bill of lading.

Paragraph IV of said second affirmative defense states:

"That upon the arrival of said vessel at the port of Kobe, the master thereof made due inquiry and was informed of the facts set forth in the preceding articles; and because of said information it was his judgment and the judgment of the agents of said vessel that it was unsafe and impracticable for said vessel to proceed to Hongkong and there attempt to make delivery of said goods or any part thereof; that in their judgment it was likewise unsafe and impracticable to proceed to any other Chinese port and there make said delivery of said goods, or any part thereof; that there was no port available, safe and nearer to Hongkong for the discharge

and storage of said goods than Kobe; that by reason of the foregoing the said vessel 'HAKUTATSU MARU' retained the goods mentioned in said libel on board at Kobe, Japan, until July 21, 1925, at which time said goods were discharged from said vessel and placed in warehouse and/or lumber pool and kept there until August 31, 1925, at which time said goods were taken from said warehouse and/or lumber pool and placed aboard the vessel 'SOMEDONO MARU' for shipment to Hongkong, China; that said last mentioned vessel proceeded, arriving at the port of Hongkong, China, on the 13th of September, 1925, and there delivery of said goods was made to the said libellant without any charge whatever for the carriage of said goods on the said vessel 'SOMEDONO MARU'."

This brings the defense within Sub-division (b) above quoted. Paragraph V of the second affirmative defense states:

"That by reason of the foregoing said vessel 'HAKUTATSU MARU' and claimant were obliged to and did pay for the discharge, lighterage, storage and reloading of said cargo at the port of Kobe, the sum of 3,870.50 yen, or $1580.68, which was the reasonable and necessary cost thereof."

These two paragraphs bring the defense within the latter portion of said paragraph 8 of said bill of lading.

WAR AND DISTANCES

The court will take judicial notice of war, strife,

etc., at Hongkong and other Chinese ports during the summer of 1925, and will also take judicial notice of the distances from

Vancouver to Kobe.........................4600 miles
Kobe to Hongkong.........................1372 miles
Yokohama to Hongkong.................1585 miles

In the *Yaquina*, 1925 A.M.C. 1419, under a clause in the bill of lading relieving the ship from the obligation to discharge cargo

> "if it shall be impossible or unsafe in the opinion of the master to discharge,"

the owners of cargo may not question the advisability of the master's action if based upon judgment exercised in good faith and in a reasonable manner.

In *The West Cawthon*, 281 Fed. 894, we find a vessel with cargo from the Orient to Havana. When the vessel reached Cienfuegos, Cuba, the master learned that the congestion in the harbor of the latter place was so great and the available discharging and warehousing facilities so limited that it would not be possible under the existing port regulations, for perhaps months, either to deliver the cargo or get out of the harbor. He discharged the cargo at Cienfuegos, and the court held that the master showed good judgment.

In the well known case of the *Kronprinzessin Cecilie*, 244 U. S. 12, 61 L. Ed. 960, we find the master of the vessel leaving the United States with a very valuable cargo of gold for delivery in England and France, turning back to America when but 1070 miles from Plymouth, England, upon the receipt of a wireless message from the vessel's owners that war had been declared by Austria against Servia, etc. It was

claimed that the vessel did not comply with the obligations of a carrier and the bill of lading contained the arrest and restraint of princes clause. The court held the master justified even though he might possibly have been able to land the gold at Plymouth a few hours before the declaration of war by Germany against England.

> "It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. *Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs.* * * *
>
> "We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man."

In the English case of *Nobel's Explosives Co. Ltd. v. Jenkins & Co.*, decided by the Queen's Bench Division in 1896, reported in Aspinall's Reports of Maritime Cases, Vol. 8 (N. S.) page 181, we find the ves-

sel carrying explosives from London to be delivered at Yokohama or "so near thereto as the vessel may safely get." The bill of lading contained the "restraint of rulers, princes, or people" exception, and a clause that, "if the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port." Several Chinese cruisers were near and the master entertained the belief that if he proceeded the vessel would be stopped and the explosives confiscated. He therefore landed the explosives at Hongkong and proceeded on his way to Yokohama. The action was to recover the expenses of storage and subsequent forwarding of the goods to Yokohama. The contention was made there as in the present case that the master could not exercise his judgment until arrival at Yokohama, the port of destination for the explosives. In holding that the master exercised his judgment properly and it was not necessary for him first to proceed to the port of Yokohama, the court stated:

> "There was a further clause in the bill of lading upon which the defendants rely, and which seems to me to afford a further answer to the plaintiff's claim. (His Lordship then read the following clause from the bill of lading: 'If the entering of or discharging in the port shall be considered by the master unsafe by reason of war or disturbances, the master may land the goods at the nearest safe and convenient port.') It was said that this clause was only intended to apply where difficulties arose upon the vessel's

arrival at the port of destination. But I see no ground for this narrow construction. The object was to enable the master to guard against obstacles which might prevent his vessel from reaching her destination in due course. There is no reason to suppose that it was intended to limit his discretion to the case where the information reached him on his arrival off the port of destination. But, apart from the terms of the bill of lading, it seems to me that the conduct of the captain would be justified by reference to the duty imposed upon him to take reasonable care of the goods intrusted to him. Whether he has discharged that duty must depend upon the circumstances of each case, and here, if the goods had been carried forward, there was every reason to believe that the ship and her cargo would be detained, and the goods of the plaintiffs confiscated. In the words of Willes, J., in delivering the considered judgment of the Exchequer Chamber, in *Notara v. Henderson* (26 L. T. Rep., at p. 446; L. Rep. 7 Q. B., at p. 237), 'A fair allowance ought to be made for the difficulties in which the master may be involved. . . . The place, the season, the extent of the deterioration, the opportunity and means at hand, the interests of other persons concerned in the adventure, whom it might be unfair to delay for the sake of the part of the cargo in peril; in short, all circumstances affecting risk, trouble, delay, and inconvenience must be taken into account.' I am of opinion that the course taken by the captain in

landing the goods and leaving them in safe custody was a proper discharge of his duty. It was said that the master was not an agent for the shippers because they had protested against the discharge of these goods. But even if this information had reached the captain, it would not have divested him of his original authority and his right to act in any emergency as agent for the owners of ship and the other owners of cargo. I therefore give judgment for the defendants with costs."

Distances

Distances in the Orient are great in miles, but not otherwise. In these modern times with fast moving vessels, wireless and cable, nautical mileage is reduced to a minimum.

Information Available at Kobe

When the master arrived at Kobe the conditions at Hongkong were easily made available to him through the wireless and the cable, and he could receive by such means all information that he could have received had he actually tied his vessel to the dock at Hongkong.

Where is "at or Near?"

Under libellant's definition, the vessel to have been "at or near" Hongkong must have been tied up to the dock in that city. Had that happened the vessel would have been subject to all of the dangers and hazards of the strike, rioting and warfare then existing in that port. Under libellant's definition the vessel could not be at Kobe, nor could it be a mile from the Hongkong

dock, nor could it be one hundred yards from the Hongkong dock. Suppose the master had taken the vessel on to Hongkong, into the harbor, up to the dock, all according to the definition of "at or near" of libellant—what more information could he have received as to Hongkong conditions which he could not have received at Kobe? The answer, of course, is: Nothing.

Suppose, at Kobe, the master should have learned, as he did in this case, that he could not discharge at Hongkong—why should he take his vessel and his valuable cargo on a voyage of 1372 miles to Hongkong and 1372 miles back again, with the ship, its cargo and crew meanwhile subjected to the perils and hazards of the sea?

It cannot be denied that neither party would knowingly enter into a contract to its own disadvantage. No steamship company would have sent its vessel from Kobe to Hongkong to get the information which it then already had, just to be "at or near" Hongkong. No shipper, having an interest in his goods, would want any steamship company to take his goods upon such a fool's errand. Therefore, in the application of common sense, it appears that the term "at or near" must be held in this case to include the port of Kobe; that the vessel at Kobe was constructively prevented from the entering and/or discharging its cargo at the port of Hongkong; that the exceptions should have been denied.

Respectfully submitted,

COSGROVE & TERHUNE,

MCCAMANT & THOMPSON,

Proctors for Appellant.

No. 5633 In Admiralty

United States Circuit Court of Appeals

For The Ninth Circuit

TATSUUMA KISEN KABUSHIKI KAISHA,
a corporation of the Empire of Japan,
Appellant,

—VS.—

ROBERT DOLLAR COMPANY,
a corporation, *Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLEE

JOHN AMBLER,
Proctor for Appellee.

1519 Railroad Avenue South,
Seattle, Washington.

THE ARGUS, SEATTLE

FILED

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UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT FOR THE DISTRICT OF OREGON

HON. JOHN H. MCNARY, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellant's opening brief has stated at length the issues involved in this case. Although appellant has raised a jurisdictional question, we hardly believe that it is being seriously pressed. The case really hinges on the correct interpretation to be placed on paragraph 8 of the bill of lading upon which the lumber involved in this proceeding was shipped.

At the risk of perhaps some repetition, we would like to briefly summarize the facts of the case as follows:

Certain lumber was delivered to the S.S. "Hakutat-

su Maru" then lying at Vancouver, British Columbia, for transportation to the port of Hongkong, China. The lumber was duly put on board, freight prepaid, and a bill of lading was issued under date of May 27, 1925.

On June 29, 1925, the vessel en route to Hongkong arrived at the port of Kobe, Japan. Upon arrival at said port, she was advised of the somewhat chaotic conditions existing in China as a result of the recent student uprisings. Thereupon, according to appellant's answer, the master and agent of the vessel decided it would be "unsafe and impractical" for the vessel to call at the port of Hongkong, and after holding the cargo on board while vessel drydocked for annual survey, the vessel discharged the cargo and stored the same at Kobe. Later the lumber was reloaded on another vessel, and was finally delivered at destination on September 13, 1925.

Before final delivery to appellee at destination, appellant, relying on Clause 8 of the bill of lading, demanded some $1500 Gold, representing alleged discharging, lighterage, storage, and reloading charges at Kobe. Appellee finally paid this amount under written protest, as it was in desperate need of the lumber and could obtain same in no other way. The clause relied on is as follows:

> "8. If the vessel be prevented by stress of weather, war, blockade, seizure, restraint, riot, strike, lockout, interdict, disease, or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same, or from discharging any or all of said

merchandise, or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged, then first: all merchandise not discharged may be retained on board vessel and returned to her port of original shipment or same may be at option of ship's master or agent and at owners cost and risk be conveyed upon such or any vessel to any other port and thence to said port of delivery; or second, same may be forwarded to and landed and delivered or stored at any other port at Owner's cost and risk and Carrier shall have a lien on said merchandise for all expense so incurred, provided, however, that if said merchandise or any thereof be so returned to such port of original shipment no additional freight shall be charged, and that delivery or storage of such merchandise at any such other port or on such return to such port of original shipment shall be a final and sufficient delivery. In case any part of the merchandise cannot be found for delivery during vessel's stay at port of discharge, same may be forwarded at Carrier's expense, but no liability shall exist for any loss or damage resulting from delay."

Appellee contends that the above clause under the admitted facts of this case, does not grant the liberty taken by the vessel in discharging her cargo short of destination and forwarding the same in the method described.

ARGUMENT

POINT I.

Jurisdiction

Respondent has first raised a question as to the jurisdiction of this court, based upon the ground that the cause of action in this case is not maritime in nature. Respondent bases its contention in particular upon the case of *The T. W. Lake*, decided by this Honorable Court in 1927, and reported in 16 F. (2) 372. In that case a libel *in personam* was filed by an insurance company against the owner of the "T. W. Lake", alleging that the insured vessel, with the privity of the assured, was sent to sea in an unseaworthy condition, that because of that condition she sank and became a total loss, that the insurance company had paid out certain sums without the knowledge or means of knowing that the vessel had been sent to sea in an unseaworthy condition, and in ignorance, misinformation and mistake of the true facts in the case. The libel prayed for the return of the money, stating that the owner of the vessel held such money for the libellant's use as and for money had and received. This court dismissed the libel for lack of jurisdiction.

Respondent has quoted from the decision of this court in *The T. W. Lake* case, but left out, we believe, some helpful language, and we particularly call the court's attention to the following quotation from the decision:

"Courts of admiralty cannot entertain an

original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, *Andrews v. Essex Fire & Marine Ins. Co.*, Fed. Cas. No. 374. In *United Transp. & L. Co. v. New York & Baltimore T. Line*, 185 Fed. 386, it was held that admiralty has no jurisdiction over non-maritime transactions following the execution of maritime contracts. This was held in reference to a counterclaim for damages on account of excessive charges paid to the libellant by the respondent under a prior contract between them, which contract was alleged to be void and fraudulent for the reason that respondent's general manager, who made it, was also an officer of the libellant and betrayed the trust imposed in him by the respondent. Said the court, 'The matter is not maritime. The *fundamental question is whether the manager of the respondent corporation, induced by his interest in the libellant corporation, betrayed his trust, and this question is not maritime in its nature.*'

"The appellant admits that its causes of action are in the nature of assumpsit for money had and received, and contends that while it is true that the libellant alleges that the appellee made incorrect proofs of loss and that the payments were made under 'misapprehension, misinformation, mistake, and ignorance of the facts,' those allegations are not the basis of the causes of action but are inserted to show admiralty jurisdiction in that the question of the *right to recover involves the construction of maritime contracts*

and the application of principles of maritime law, and it relies upon *Kittegaun; U. S. Shipping Board v. Banque Russo Asiatique,* 1923 A.M.C. 387, 286 Fed. 918; *John Francis,* 184 Fed. 746; *Allanwilde v. Vacuum Oil Co.,* 248 U. S. 377; and *Int. Paper Co. v. Gracie D. Chambers,* 248 U. S. 387. In the first two cases so cited the libels were brought to recover money exacted under duress and paid under protest. *The parties to those actions were in the same attitude to the litigation that they would have been in had the action been brought directly upon the contracts, and the only question before the court was the proper construction of contracts of affreightment and the determination of the rights of the parties thereunder.* The same substantially is true of *The Allanwilde* and the *Gracie Chambers* case. The question of jurisdiction was not raised or discussed in those cases and decision there turned wholly upon the meaning of the provisions of charter parties. *Those cases differ from the case at bar.* Here the action is not merely an action on a maritime contract or tort, nor a suit to enforce liability under the covenants of policies of marine insurance. It is an action growing out of certain alleged inequitable acts of the appellee, and primarily its purpose is to recover money obtained by means of fraud and false representations." (Italics ours)

It will be noticed from the quotation that this court recognized that admiralty jurisdiction extended to suits to recover money paid under protest, if the

gist of the action was "the proper construction of contracts of affreightment and the determination of the rights of the parties thereunder." The court correctly distinguished the facts in regard to *The T. W. Lake* case, as the purpose of that action was "to recover money obtained by means of fraud and false representations". The distinction in the two lines of cases was clearly drawn by this court, and is quite obvious.

The same distinction applies to the case of *United Transport & Lighterage Co. v. New York, etc.*, 185 Fed. 836, quoted and discussed in *The T. W. Lake* case.

Appellant here invokes one other case in support of its contention that the court is without jurisdiction. This is the case of *Boera Bros. v. United States*, 1924 A. M. C. 1474. In this case the court used the following language: "The libellants are not seeking to enforce a maritime contract, nor to obtain an accounting as incident to a maritime contract * * *". There, again, the case was not based on any interpretation of a maritime contract, nor was any effort being made to enforce such a contract.

An examination of the cases upon which libellant in the *T. W. Lake* case relied shows that they are directly in point with the case at bar.

In the case of *The Kitteguan*, 286 Fed. 918, the facts were as follows: The Kitteguan arrived at her port of destination with certain cargo on board. The consignees of the cargo were unknown. The cargo was kept on board for several days and finally discharged into open lighters. The ship's agent refused to deliver the goods until the consignee made payment

for freight and demurrage. This was paid under protest, and consignee filed its libel for recovery. On the question of admiralty jurisdiction, the court said:

> "Nor do we agree with appellant's contention that the claim is not within the admiralty jurisdiction. *A decision of the matters in dispute between the parties necessitates a construction and review of the terms of bill of lading, a distinctly maritime contract.* From time immemorial the construction of such contracts and the determination of issues arising out of them, has been part of the duty of the courts of admiralty." (Italics ours)

In the case of *The John Francis*, 184 Fed. 746, also referred to in *The T. W. Lake* case, the consignee did not take delivery of goods within the lay days provided by the charter, and they were discharged. Ship's agent would only deliver upon payment of freight and certain charges accruing subsequent to discharge. This money was paid under protest, and a libel *in rem* was filed to recover the amount paid. The court recognized that, although it was really an action for money had and received, it was a proper basis for a libel *in rem*, as it involved the construction of the agreement between the parties. We would call the language of this case particularly to the court's attention.

The case at bar falls directly within the rule laid down in *The Lake Eckhart*, 1924 A. M. C. 498. There libellant was a charterer of respondent's steamer and undertook to supply a full cargo of sugar. The vessel went to the quay, but did not load the full quantity.

The master informed the shipper that the remaining cargo would have to be loaded outside of the bar on account of the vessel's draft. Weather conditions prevented this. The master demanded dead freight, and threatened to place a lien upon the cargo at destination if dead freight were not immediately paid. Libellant paid the amount under protest and sued to recover. Under the terms of the charter, act of God, fire, "and every other unavoidable hindrances * * * always mutually excepted." The court said:

> "Respondent concedes that if it were seeking to collect for dead freight, the action would be within the admiralty jurisdiction. It is contended, however, that libellant is merely endeavoring to enforce an implied promise to repay money improperly exacted, and as the agreement does not in terms provide for such repayment, there is no relief to be had in this branch of the court."

It will be noticed that this is just the point set up by counsel in this case. The court goes on:

> "In my opinion, a ship owner is not to be permitted, after the partial execution of a valid charter party, and after a shipper is placed in a position in which, as a practical matter, it is impossible to do otherwise than submit to an improper exaction of money, to deny that the admiralty is without jurisdiction to pass upon the rights of the parties.
>
> "Such doctrine, even if it exists under any circumstances, cannot here be adopted, and for this reason: If libellant, as a matter of fact and

of law, was not bound to pay for dead freight, the refusal and failure of the master of the *Lake Eckhart* to carry and deliver the loaded cargo according to the terms stipulated in the charter party, constituted a breach of a maritime contract of which this Court has jurisdiction. The money improperly exacted represents the damages sustained by libellant through respondent's failure to carry out its agreement."

See also,

G. A. Tomlinson, 279 Fed. 786.

We respectfully submit that the admiralty jurisdiction in cases such as that under discussion, as shown by the foregoing cases, is well established; and we further respectfully submit that this Honorable Court in their decision in the case of *The T. W. Lake* expressly recognized the jurisdiction of admiralty in cases such as the one at bar.

Appellant raises the question as to whether an action *in rem* lies against the S. S. "HAKUTATSU MARU" by reason of the fact that the actual delivery in this case at Hongkong was made by another vessel. We respectfully submit that the contract in this particular case was between appellee and the "HAKUTATSU MARU"; that said vessel is setting up as a defense for its breach of contract a clause of their contract. The fact that said vessel employed some other vessel to make final delivery does not excuse her responsibility for breach of the contract. The S. S. "HAKUTATSU MARU", respondent in this proceeding, contracted to deliver lumber, under certain conditions, at Hongkong. She failed to do so, and appellee

is seeking in this proceeding to hold her responsible for failure to comply with her contract. The other vessel participating plays no part, save perhaps that of an agent.

POINT II.

Interpretation of Clause 8

The vessel here agreed to transport certain lumber from Vancouver, British Columbia, Canada, to Hongkong, China, for a certain consideration. It failed to do so.

There are two possible means of escape for the carried: (1) an implied condition in an absolute contract that the contract will end if the venture is *frustrated* by impossibility of performance; and (2) where performance is excused under the terms of the bill of lading itself. This is well stated in the case of *The Poznan*, 276 Fed. 418, where Judge Learned Hand, one of the ablest of admiralty judges, uses the following language:

> "Everyone agrees that an undertaking to deliver as evidenced by the bill of lading was absolute except in so far as it was excused, and there are only two excuses offered: first, that the venture was frustrated by impossibility of performance; second, that performance was excused under the terms of the bills of lading themselves."

See also,

Hellig Olaf, 282 Fed. 534.

Under exactly which of the above two exceptions to

the carrier's responsibility appellant contends that the instant case falls, it is hard to say.

Discussion of Appellant's Authorities

In the first case cited in appellant's brief, *The Yaquina,* 13 F. (2) 394, the facts were as follows: The vessel arrived at the port of Piraeus, Greece, and was boarded by men in uniform who ordered the vessel not to discharge the cargo, most of which was consigned to the Greek army at that port, but to proceed to Salonica. They also delivered a document purporting to be under the seal of the Minister of War, ordering him to proceed to the latter port. The harbor was under martial law, and all lighters had been requisitioned by the army. The bill of lading provided that if, on account of any cause beyond the control of the steamer, it was impossible or unsafe, "in the opinion of the master", to unload goods at the port of discharge, the same could be carried to the next convenient port for transshipment, or retained on board for delivery on return.

The master testified as to what had occurred in Piraeus, and as to what led him to believe it was impossible to discharge at that port. The court found he acted in good faith, and held that the parties to the bill of lading, if they agree to abide by the master's opinion as to whether or not it is safe to discharge cargo at the point of destination, they may not question the advisability of his judgment if exercised in good faith.

It will be noticed that the vessel actually arrived at the port of discharge, and upon its arrival found

conditions which the court held showed the master's action was taken in good faith. If, in the instant case, the vessel had actually proceeded to the port of discharge, and the master in good faith had exercised his judgment upon examination of the entire situation, the appellee could not complain. It is appellee's complaint, however, that under the terms of the agreement appellant must actually proceed to the port of discharge before exercising his judgment as to whether or not it is safe to discharge at that point. Short of destination, his judgment is valueless. In the cited case he did so; hence the case is not in point.

Appellant's next case, the *West Cawthon*, 281 Fed. 894, is also not in point. In this case libelant sought to recover damages for non-delivery of rice shipped by the named vessel from the Orient to Havana. When the vessel reached Cienfuegos, Cuba, a very nearby port, she discovered that the congestion in the port of Havana was so great that it would be impossible to deliver her cargo there for months. The master consequently discharged the rice at that port. The basis of the decision is found in the following paragraph:

> "The claimant relies upon various provision of its bill of lading which it contends grants freedom in the master's discretion to discharge at another port than that of agreed destination. *It is unnecessary to consider whether this contention is or is not well founded, for the evidence abundantly shows that the delivery at Cienfuegos, instead of Havana, caused no legal damage to*

the libelant, as the rice could have been sold for as much or more at Cienfuegos as it would have brought at Havana." (Italics ours)

The judge's remarks in this case with regard to the good judgment exercised by the master, as shown by the above quotation, has absolutely no connection with the facts of the instant case, as the exercise of the master's judgment in the instant case, as will be shown below in more detail, is based upon a specific liberty granted by the contract, where, in the *West Cawthon* case, the court said there was no use considering the contract as the libelant hadr eceived no legal damage, and in the instant case appellee has admittedly received damage.

The third case cited by appellant, the *Kronprinzessin Cecilie*, 244 U. S. 12, is an extremely interesting case. It is one of the outstanding cases in the United States on the subject of "*frustration*". In this case the above vessel started for England just before war was declared. Three days later she received notice from her owners to return to New York. The following day the German Imperial Marine Office wirelessed that war was threatened and to touch at no British, French or Russian port. When the master received the word from his owners that war had been declared, and to return, he had just enough coal to either complete his voyage or return to New York. He returned to the United States. The court held that his action in so doing, under all the circumstances, was justified. In the opinion Justice Holmes uses the following language:

"With regard to the principles upon which the

> obligations of the vessel are to be determined, it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was 'arrest and restraint of princes, rulers, or peoples', other exceptions necessarily are to be implied unless the phrase restraint of princes be stretched beyond its literal intent."

The court held the case was not one of "arrest and restraint", limiting that to more immediate apprehension of danger. From this language, and from the entire opinion, it is clear that the rule in the *Kronprinzessin* case is based upon the doctrine of "frustration". Many cases involving this principle arose during the war, particularly with vessels under long time charters where the charterer was paid a much higher rate by the government on account of war conditions when the vessel was requisitioned, whereas the owner received merely the original charter hire. The questions involved in this doctrine were bitterly fought out, in several cases going to the British House of Lords, and the whole basis of this doctrine was thoroughly threshed out.

The doctrine is based upon an implied condition in the contract that the parties did not promise to perform an impossibility. It is based upon the failure of something which was, at the basis of the contract, in the mind and intention of the contracting parties. The doctrine is *absolutely inapplicable* to the case under discussion, as there is a settled exception to this doctrine. This exception is thus stated in MacClachlan's Law of Merchant Shipping, p. 474:

> "The rule (of frustration) rests on the presumed intention of the parties. *Where the contract makes full and complete provision usually intended for a common contingency the principle does not apply thereto.*"

In Williston on Contracts, sec. 1937, this authority says, speaking of this doctrine:

> "Of course, if the contract makes provision for a contingency which occurs, the provision is applied; but in cases properly involving the defense of impossibility, the words of the promise are absolute."

In *Bank Line v. Capel* (1919) A. C. 435, Lord Sumner, in the British House of Lords, uses the following language:

> "The theory of dissolution of a contract by the frustration of its commercial object rests on an implication, which arises from the presumed common intention of the parties. 'Where a contract makes full provision' (that is, full and complete provision, so intended) 'for a given contingency, it is not for the court to impart into the contract some other and different provisions for the same contingency called by a different name'."

So, again, in *Tamplin v. Anglo-Mexican Petroleum Co.* (1916) A. C. 397, another case decided in the British House of Lords, the court, speaking of the doctrine, says:

> "Where a contract makes full and complete provision for a common contingency, the principle does not apply."

The following is an extremely clear pronouncement of this exception to the doctrine of frustration:

> "It was argued that the contract was frustrated; but the doctrine of frustration applied only when an implication of law must of necessity be introduced into the contract, and it never applied where there was a clause in the contract actually providing for the precise state of affairs which was relied on as producing frustration."
>
> *Banch v. Bromly*, 37 L. T. R. 71.

This is merely a common sense proposition. If the parties enter into an agreement in which they recognize the possibility of a certain contingency, and make full provisions for each party's rights in the event of such a contingency, it is manifestly not just for a court to wipe out the contract of the parties and make an entirely new one for them. *In the case at bar the contract specifically states what liberties are granted in case of strikes, riots, etc. The court cannot add to or deduct from this contract. It can only construe what is in the contract. The doctrine of frustration is manifestly inapplicable.*

The last case cited by claimant, *Nobel's Explosives Co. Ltd. v. Jenkins & Co.*, is also reported in (1896) 2 Q. B. 326. In this case a vessel carrying explosives to Yokohama, Japan, entered the port of Hongkong, and in accordance with local regulations raised a red flag denoting she had explosives on board. The same day war was declared between China and Japan. In addition to shore batteries, several vessels of the Chinese navy were cruising outside of the port of Hongkong. The flag publicly announced she had

war materials on board. The bill of lading provided for "restraint of princes and rulers," and also contained a further clause as follows:

> "In case of a blockade or interdict of the port of discharge, or if the entering of or discharging in the port of discharge shall be considered by the master unsafe by reason of war or disturbance, the master may land the goods at the nearest safe and convenient port at the expense and risk of the owners of the goods."

The master discharged his cargo of explosives at Hongkong and continued on his way. The court justified his action on the ground of this constituting a restraint of princes and rulers, stating that the presence of the battleships right outside the harbor constituted just as serious a restraint as if they were actually holding the vessel. The court went on to state that the quoted clause of the bill of lading might also afford a further answer to the claim. The libelant in that case contended that the vessel had to proceed to Yokohama before she would be entitled to claim the benefits of this clause, and the court held that such was not the case.

The *Nobels Explosives* case and the instant case can be distinguished upon two very distinct grounds: first, the clause relied upon in that case permits the liberty to be taken advantage of "in case of a blockade or interdict of the port of discharge." Such a blockade actually existed, and would go into effect as soon as the vessel left the port of Hongkong. A condition of war existed. The vessel carried contraband consigned to a belligerent whose opponent's battle

cruisers were waiting for it right outside the harbor. No more effective blockade can be conceived regarding this vessel.

The chief distinction, however, is in the actual wording of the clauses. The wording of the clause in the *Nobels Explosives* case is very broad; no limit is put upon the master's exercise of judgment. The clause does not say that the vessel must be prevented from entering the port of delivery "on arrival at or near the same". It does not say that the master must think it impracticable to there land the cargo "while the ship be at said port". It does not say that all merchandise "not discharged may be *retained* on board vessel". It merely says that if entering or discharging is considered unsafe, the master may land the goods at the nearest safe and convenient port. Although this is the closest case cited by claimant, the facts are so utterly different and the wording of the clause so utterly unlike, that it is of no value.

As stated in the foregoing, the entire problem in this case thus resolves itself into the question—

Is Performance Excused by Clause 8 of the Bill of Lading?

Paragraph 8 of the bill of lading falls naturally, grammatically, and by punctuation into three situations. The liberties later granted are predicated upon the existence of one of these three situations. This clause of the bill of lading may be paraphrased as follows:

If vessel be prevented by riot or strike or other cause

(a) from entering said port of delivery on her arrival at or near the same;

(b) from discharging any or all of said merchandise;

(c) while the ship be at said port, if in judgment of ship's master or agent it be considered impracticable to there discharge any or all of said merchandise, or for same to be there safely landed if discharged; then

1—A. *all merchandise not discharged* may be retained on board vessel and returned to her port of original shipment; or

B. *same* may be conveyed upon such or any other vessel to any other port and thence to port of delivery; or

2—*said merchandise* may be forwarded to, and landed, and delivered, or stored, at any other port at owner's cost and risk, and carrier shall have a lien for expenses so incurred.

The three clauses are distinctly set off by commas, and contemplate three distinct situations. In appellant's brief it attempts to rewrite this paragraph. It has combined (a) and (b), thus subdividing these three divisions into two divisions. The purpose of this rewriting is apparently to make the words "at or near" modify, if possible, each situation. From that appellant argues that a vessel need only be "at or near" a port for the master to exercise his judgment, and that Kobe, 1376 miles from Hongkong, is "at or near" Hongkong.

Examining paragraph 18, it will be seen that, after

the enumerated causes for prevention, the clause continues:

> "or any other cause of whatsoever kind from entering said port of delivery on her arrival at or near the same (comma) or from discharging any or all of said merchandise (comma) or if in judgment of ship's master or agent it be impracticable to there discharge all or any of said merchandise while the ship be at said port or for same to be there safely landed if discharged (comma) then first: * * *"

From this wording and punctuation, it is absolutely impossible, without rewriting this clause, to make the words "at or near" modify any clause other than that in which it is contained, *i. e.*, this phrase modifies the entering of the port of delivery and that situation alone.

From the above it is clear that this clause anticipates the vessel proceeding to the port of delivery. She is granted certain liberties if, upon her arrival *at or near* the port of delivery she is *prevented* by certain causes from entering, or if she is *prevented* by some cause from discharging after entering the port of delivery. Exactly what constitutes a strict *prevention*, is somewhat difficult to ascertain. Consequently, the next liberty is somewhat broader. *While the ship is at the port of delivery*, if, in the judgment of the ship's master or agent, it becomes "impracticable to there discharge", the vessel is then granted the same liberties as if she were actually *prevented*. A vessel must be actually near or in a port to be *pre-*

vented from entering or discharging. (See cases cited and quoted below.)

As a safeguard upon the exercise of the judgment of the master, the same requisite is put into the clause which allows the vessel liberties where the master believes it impracticable to discharge, without actually being *prevented.* This safeguard is that, as a condition precedent to the exercise of the master's judgment, the vessel must be present at the port of discharge, where the master is in actual touch with existing conditions and, having the whole picture before him, can use his best judgment.

The Entire Clause Bears Out This Construction

"* * * it be impracticable to *there* discharge * * * while the ship be at said port." This is foolish reiteration, unless "while the ship be at said port" refers to the time when judgment must be exercised.

Prevention

Appellant on page 22 of its brief makes some argument that the vessel was *prevented* from entering Hongkong and discharging. As suggested above, "prevention" means a definite check or restraint. It has a definite restricted meaning in bills of lading.

In the case of *Schilizzi v. Derry*, 4 El. & Bl. 872; 119 Eng. Rep. 324, a vessel was chartered to proceed to a certain port, or so near thereunto as she might safely get, and to there load cargo for a United Kingdom port. The charter party contained the usual exceptions of act of God, perils of the seas, etc. The vessel arrived November 5th within some miles of

the port, when it was found that the river by which it would be forced to proceed was barbound. On December 11th she sailed to another port and took cargo from other parties. It would have been unsafe for her to remain at the mouth of the river after December 11th, and the port to which she went was the nearest port. On January 7th there was water enough for the vessel to have proceeded to her port of loading. It was held that the vessel was not prevented from accomplishing the purpose of the charter party, and the vessel was forced to respond in damages. The opinion says:

> "Here is a positive contract to proceed to a port unless prevented by dangers and accidents of the seas, etc. That must mean prevented from doing so at all: it would be most dangerous to hold that a temporary obstruction puts an end to the obligation."

The reason for putting in the bill of lading the third liberty granted by Clause 3, is the difficulty shipowners might have in establishing *prevention*, as the rule is very strict.

In *Comptoir Comm. Anversois v. Power, Son & Co.* (1920) 1 K. B. 868, the facts were as follows: Certain contracts were made during June and July contemplating sale of wheat to be transported from New York to certain European ports. The contracts provided that in the event of war, if sellers had not received from buyers insurance policies, they would have the right to cover the goods themselves. At the time of shipment insurance was impossible to effect, and without insurance the bills of lading could not

be negotiated. The contracts were broken, and the buyers sued the sellers, who defended on the ground that the shipments were prevented by a clause of the contract as follows: "In case of prohibition of export, force majeure, blockade, or hostilities preventing shipment, this contract or any unfulfilled part thereof shall be at an end." We quote below from the opinion of the lower court on the construction to be placed on the word "prevention". This opinion was affirmed in the upper court:

> "So there was nothing in this case to prevent shipment, except the inability to sell exchange, and the arbitrators, in finding that 'shipment was prevented by hostilities within the meaning of the prohibition clause', must be basing themselves upon this inability. Now, if I give to the word 'shipment' the widest meaning of which it is capable, it cannot mean more than bringing the goods to the shipping port and then loading them on board a ship prepared to carry them to their contractual destination. It is this, or some part of this, which has to be prevented by hostilities, to bring the sellers within the clause. The remaining question is, what does 'prevent' in this connection mean? Now, both upon authority, and as a matter of construction apart from authority, I am of opinion that as used in this clause 'prevention' means either physical or legal prevention. Inability to sell exchange is neither the one nor the other. Moreover, as I have pointed out, inability to sell exchange does not arise in respect to any given cargo until such cargo is

> shipped. I think the finding of the arbitrators on this point is wrong."

Banks, L. J. in the opinion of the upper court, referring to the above, said:

> "He also held that the prevention referred to in the exception clause referred to a physical or legal prevention. In this also I think he was right."

Later in the opinion the court states that "Economic unprofitableness is not 'prevention'."

In this particular case, to state that a vessel lying at Kobe was prevented from entering the port of Hongkong, or prevented from discharging at that port, is manifestly absurd. The term "prevention" means something far more immediate.

The Third Liberty Granted by Clause 8 Is Manifestly and Necessarily the Basis of Appellant's Defense

As suggested, it is sometimes quite hard for a court or a jury to state what constitutes a *prevention.* Must there be actual physical violence, or can there be constructive prevention? If a constructive prevention, what constitutes a sufficient restraint to become a constructive prevention? The *Kronprinzessin* case, cited by appellant, indicates a strict rule, as there the court held no "arrest or restraint" existed. To avoid such questions arising, the third liberty is granted by the bill of lading. This liberty is as follows: *While ship be at said port*, if in the judgment of the ship's master or agent, it be impracticable to *there* discharge all or any of said merchandise, then "all

merchandise not discharged may be retained on board * * *" but "same may be forwarded to and landed * * *." Appellee's construction gives every word in the quoted phrase a real meaning.

Appellant speaks at some length of the *master's bona fide* exercise of discretion in this case. This is not under discussion at the present time, and is totally irrelevant, as there is a condition precedent provided in the contract between the parties to the master's exercise of discretion, and until this condition precedent has been complied with he cannot exercise his discretion in changing or avoiding the explicit terms of the bill of lading under which the lumber in this case was transported.

By the contract in the present case, the vessel agreed to carry for libelant certain lumber from Vancouver to Hongkong. The vessel has inserted in its contract certain liberties on which it relies upon the happening of certain contingencies. Appellant alleges that a certain contingency has arisen, and seeks to take advantage of the liberty consequently granted. The rights of the parties as above outlined *are solely dependent* upon the wording of clause 8 of the bill of lading. In speaking of a somewhat similar clause in the case of *The Poznan* (*supra*), the court said:

> "It gives the master the broadest discretion to terminate the venture and discharge the ship at that port which most nearly will fill the contract. Obviously such an exception should be scrutinized with care unless the charterer is to be free at pleasure to disregard the whole purpose of the voyage. The ruling that exceptions must be

> strictly construed (citing case) applies with exceptional force."

The clause mentioned in *The Poznan* case provided that in case of war, etc., "whether existing or anticipated", which the master might think would give rise to delay or difficulty in reaching, discharging or leaving at the port of discharge, he was given the liberty to discharge elsewhere. Another clause in the bill of lading in that case provided for liberty in the event of certain contingencies "with or without proceeding to or towards the port of discharge, or entering or attempting to enter or discharge the goods there".

Exceptions in bills of lading are always construed against the shipowner. *The West Aleta*, 1926 A. M. C. 855, decided in the Circuit Court of Appeals of Ninth Circuit, is a good example of the strictness with which particular this Circuit views the liberty clauses in a bill of lading.

See, also, *Compania v. Brauer*, 168 U. S. 104, where the court said:

> "Exceptions in the bill of lading or charter party inserted by the shipowner for his own benefit, are unquestionably to be construed most strongly against him."

Despite this well settled rule, appellant avowedly asks the court to rewrite and repunctuate the clause in *its* favor. Appellee is asking the court only to construe the contract as written and as punctuated; it asks for no ambiguity to be resolved in its favor. There is no ambiguity in the clause under discussion. If there is ambiguity, appellee is entitled by law to

have such ambiguity resolved in its favor. Appellant virtually asks the court to take out of the clause the words "while the vessel be at said port", and then asks the court to violate every rule of grammar and puncuation by holding that the words "at or near", found only in the first situation provided for, and set off by punctuation with the first situation, modify the succeeding situations. Such a request is inconceivable, particularly where it is claimant's own document. If the clause needs rewriting, it should have been rewritten before.

Conclusion

In conclusion we submit that:

1. The jurisdiction of this court is well established.

2. The doctrine of "frustration" injected by the appellant is wholly inapplicable.

3. The S.S. "Hakutatsu Maru", while she was at Hongkong, was never *prevented* from *entering* the port of Hongkong or *discharging* at that port.

4. The master or agent of the vessel, under the terms of the contract of carriage, could exercise his discretion only "while the ship be at said port" of discharge, and not while the vessel lay over a thousand miles away, at Kobe, Japan.

For the foregoing reasons, we respectfully request the court to affirm the decision of the lower court upholding appellee's exceptions to the amended answer of appellant.

Respectfully submitted,

John Ambler,
Proctor for Appellee.

1519 Railroad Avenue South,
Seattle, Washington.

Seattle, Washington,
February 25, 1929.

No. 5634

United States
Circuit Court of Appeals
For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
DEC 4 - 1928
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. COSGROVE & TERHUNE, 2001 L. C. Smith Building, Seattle, Washington,
Attorneys for Appellant.

Messrs. BRONSON, JONES & BRONSON, 614 Colman Building, Seattle, Washington,
Attorneys for Appellee. [1*]

In the Superior Court of the State of Washington for King County.

11,940.

No. 203,483.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,
Defendant.

COMPLAINT.

Comes now the plaintiff and complains of the defendant, and for cause of action alleges, as follows:

I.

That the plaintiff is a corporation organized and existing under the laws of the State of Washington

*Page-number appearing at the foot of page of original certified Transcript of Record.

and has paid its annual license fee to the State of Washington last due.

II.

That the defendant is a corporation organized under the laws of the State of Illinois, having an office for the transaction of and carrying on business at the City of Seattle, King County, Washington.

III.

That on or about the 2d day of June, 1927, for a valuable consideration, the defendant made, executed and delivered to the plaintiff a certain negotiable instrument, denominated a trade acceptance, in words and figures as follows, to wit:

No. ———. Date June 2, 1927.

$8000.00
266.66
———
8266.66

On Sept. 20, 1927, pay to the order of the undersigned EIGHT THOUSAND AND NO/100, together with six per cent interest from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of [2]

LAKE UNION DRY DOCK & MACHINE WORKS,

By OTIS CUTTING,
Treasurer.

H. B. JONES,
Secretary.

To Fairbanks, Morse & Company
Seattle, Washington.
Accepted June 2, 1927.
Payable at First National Bank of Seattle.
FAIRBANKS, MORSE & COMPANY.
By C. R. MILLER,
Agent.

IV.

That said instrument was thereafter, on or about the 3d day of June, 1927, discounted by the plaintiff with, and duly negotiated by it by endorsement to, the First National Bank of Seattle.

V.

That thereafter the said First National Bank of Seattle, being the owner and holder thereof, did on September 20, 1927, duly present said trade acceptance for payment, and payment thereof was by the defendant refused, and the said First National Bank of Seattle did thereupon cause said trade acceptance to be duly protested for nonpayment, and caused notice of such nonpayment and protest to be given to this plaintiff and demanded of this plaintiff, as endorser, payment on account thereof, and that plaintiff was thereupon compelled to and did pay to the said First National Bank of Seattle the amount of said trade acceptance, and thereupon became and now is the owner and holder thereof.

VI.

That the defendant herein refuses to pay said trade acceptance to the damage of this plaintiff in the sum of Eight Thousand Two Hundred Sixty-

six and 66/100 Dollars ($8,266.66), together with interest thereon from and after September 20, 1927, at the rate of six per cent (6%) per annum. [3]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Eight Thousand Two Hundred Sixty-six and 66/100 Dollars ($8,266.66) and interest at six per cent (6%) per annum from and after September 20, 1927, together with its costs and disbursements herein.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

H. B. Jones, being first duly sworn, on oath deposes and says:

That he is Secretary of Lake Union Dry Dock & Machine Works, a corporation, and one of the attorneys for the said corporation, plaintiff above named; that he makes this verification for and on its behalf and is duly authorized so to do; that he has read the above and foregoing complaint, knows the contents thereof and believes the same to be true.

H. B. JONES.

Subscribed and sworn to before me this 23d day of September, 1927.

E. W. PARKS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Filed in the County Clerk's Office, King County, Wash., Sep. 28, 1927. Abe N. Olson, Clerk. By S. R. Battenfield, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 24, 1927. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [4]

In the Superior Court of the State of Washington, for King County.

No. 203,483.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,

Defendant.

ORDER OF REMOVAL.

This cause coming regularly on for hearing before the undersigned Judge, on the petition and bond of defendant herein for an order transferring this cause to the United States District Court, for the Western District of Washington, Northern Division, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law, and that the defendant has filed its bond duly conditioned, with good and sufficient surety as provided by law, and that defendant has

given plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court:

NOW, THEREFORE, said petition and bond are hereby accepted, and IT IS HEREBY ORDERED AND ADJUDGED that this cause be, and it hereby is removed to the United States District Court for the Western District of Washington, Northern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 14th day of October, 1927.

JOHN A. FRATER,

Judge.

Filed in County Clerk's Office, King County, Wash., Oct. 14, 1927. Abe N. Olson, Clerk. By A. L. Lawrence, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 24, 1927. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [4A]

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,940.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,

Defendant.

EXCERPTS FROM DOCKET ENTRIES.

FILINGS—PROCEEDINGS.

Oct. 24, 1927. Filed transcript on removal (King County) embracing bond, complaint, notice of petition, order of removal, petition for removal, and summons.

* * * * * * * * * * *

Oct. 5, 1928. Filed defendant's motion for new trial.

* * * * * * * * * * *

[5]

[Title of Court and Cause.]

ANSWER.

Comes now the above-named defendant and answering plaintiff's complaint, denies and alleges:

I.

Answering Paragraph III of said complaint, said

defendant denies each and every allegation therein contained; and alleges that if any such document was executed, that the said C. R. Miller, named in said purported document as agent of defendant, had no authority or right to make, execute and deliver or to accept said document, for or on behalf of the defendant, Fairbanks, Morse & Co. Defendant further alleges that if said document was so executed by the said C. R. Miller, it was without the knowledge or consent of the defendant.

II.

Answering Paragraph IV of said complaint, said defendant denies that it has sufficient knowledge or belief as to the truth or falsity of the allegations therein contained, and therefore denies each and every one thereof.

III.

Answering Paragraph V of said complaint, said defendant admits that on or about the 20th of September, 1927, said [6] First National Bank of Seattle did present to the defendant a purported trade acceptance, which the said defendant refused to pay; but defendant denies each and every other allegation in said paragraph contained.

IV.

Answering Paragraph VI of said complaint, said defendant admits that it refuses to pay said purported trade acceptance, but denies each and every other allegation in said paragraph contained.

WHEREFORE, defendant, having answered, prays that said action be dismissed and that said

defendant recover its costs and disbursements herein.

COSGROVE & TERHUNE,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

Howard G. Cosgrove, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the defendant above named, and as such makes this verification on its behalf; that he has read the foregoing answer, understands and believes the same to be true; that he makes this verification for the reason that said defendant is a corporation of the State of Illinois, and at this time has no officer in the State of Washington capable of making this verification.

HOWARD G. COSGROVE.

Subscribed and sworn to before me this 4th day of November, 1927.

ROBERT S. TERHUNE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within answer received this 7th day of Nov., 1927.

BRONSON, JONES & BRONSON,
Attorney for Plaintiff.

[Endorsed]: Filed Nov. 8, 1927. [7]

[Title of Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto, by their undersigned attorneys, that this action, having been set for trial for Tuesday, September 4, 1928, at the hour of 10:00 o'clock A. M., may be tried and determined by the Honorable Jeremiah Neterer, Judge of the above-entitled court, without the intervention of a jury, such trial by jury being hereby expressly waived.

Done at Seattle, Washington, this 11th day of July, 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

COSGROVE & TERHUNE,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 14, 1928. [8]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 11,940.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,

Defendant.

JUDGMENT.

This cause, having come on regularly for trial upon Tuesday, the 4th day of September, 1928, before the undersigned sitting without a jury, the parties hereto having expressly waived trial by jury, and the Court having heard and considered all of the evidence herein, together with arguments of counsel, and being fully advised in the premises,—

NOW, THEREFORE, IT IS CONSIDERED, ORDERED, ADJUDGED AND DECREED, that plaintiff do have and recover of and from the defendant the sum of Eight Thousand Two Hundred Sixty-six and 66/100 Dollars ($8,266.66), together with six per cent interest thereon from Sept. 20, 1927, to the date of entry hereof, amounting to $493.22, and together with its costs and disbursements herein taxed against the defendant in the sum of $65.35, making a total judgment in favor of plaintiff, Lake Union Dry Dock & Machine Works, a corporation, and against the defendant, Fairbanks-Morse & Co., a corporation, in the sum of ———.

Defendant excepts and same is noted.

Done in open court this 18th day of September, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 18, 1928. [9]

[Title of Court and Cause.]

HEARING ON DEFENDANT'S MOTION FOR NEW TRIAL.

Now on this 15th day of October, 1928, this matter comes on for hearing on the defendant's motion for a new trial with Bronson, Robinson and Jones appearing as counsel for the plaintiff and Cosgrove & Terhune appearing as counsel for the defendant. Said motion is argued by counsel and is denied. An exception is noted. Bill of exceptions is certified.

Journal No. 16, at page 355. [10]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that in the trial of this cause, beginning on the 4th day of September, 1928, the Hon. Jeremiah Neterer presiding, both parties appearing by counsel and having heretofore made and filed herein their written waiver of a jury, the following testimony was taken and proceedings had:

TESTIMONY OF H. B. JONES, FOR PLAINTIFF.

H. B. JONES, a witness for plaintiff, being sworn testified:

"I was attorney and secretary for the plaintiff in the latter part of 1926, and had business for the

(Testimony of H. B. Jones.)

plaintiff with the defendant. I had a claim to collect of eight thousand dollars balance due for repair work performed by plaintiff on the 'Ethel M. Sterling,' formerly the 'Hawaii.' I have a letter dated April 8, 1927, signed by Mr. Kuppler, who was the credit man for defendant here, written on the letterhead of the Sterling Steamship Company. Kuppler was treasurer of the latter company. I also had dealings with Mr. Miller, manager of the defendant's Seattle branch."

Whereupon the letter referred to was offered in evidence by plaintiff, and defendant objected as follows:

"I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has [11] never been brought to the knowledge of Fairbanks, Morse & Company."

Whereupon the Court ruled:

"Let it be admitted. Let it be filed. Proceed."

It was admitted in evidence and marked Plaintiff's Exhibit 1. To this ruling the defendant noted an exception, which the Court allowed.

The witness further testified:

"After the receipt of this letter, Mr. McLean, who is the President of the plaintiff corporation, and myself, went down to the defendant's office and called on Mr. Kuppler, its credit manager, and the gentleman I referred to as having signed that letter. We told him that we had come to see if we could not make some arrangement about

(Testimony of H. B. Jones.)

the payment of this bill or taking care of it. The contract under which the work was done provided that the payment should be made by March 1st. I have the contract in hand under which the work was done. It was between the plaintiff, by Otis Cutting and Sterling Steamship Company by Roy M. Sterling, President, and W. R. Kuppler, Treasurer."

The document was marked Plaintiff's Exhibit 2, offered and admitted in evidence.

The witness thereupon further testified:

"That contract provided that the payments should be made by March 1st, 1927. That payment had not been made, and this letter, Plaintiff's Exhibit 1, asked to postpone those payments over a period running up into the fall. Mr. McLean and I told Mr. Kuppler that the plaintiff was unwilling to let those payments be postponed as requested, that the plaintiff had an obligation of ten thousand dollars to meet on June 20th, and that it was very essential that it have these funds in hand on or before that time, and Mr. Kuppler stated that our claim was superior to their claim."

To which statement defendant objected as hearsay testimony. The Court sustained the objection, saying:

"Yes. Objection sustained to what he said unless it is shown it was in the presence of the defendant." [12]

The witness further testified:

"Defendant had a mortgage on the 'Ethel M.

(Testimony of H. B. Jones.)

Sterling' filed for record on December 11th for $30,800.00—the defendant had furnished the engines for the vessel and Mr. Kuppler told us that in addition to the mortgage indebtedness they also had a claim of about twenty thousand dollars unsecured."

Defendant objected, on the ground that there was no showing that Mr. Kuppler had any authority of any kind whatever to make any statements.

"Kuppler said we need not have any fear because our claim was first and would ultimately have to be paid; that the ship was then on the way to Galveston, and was going to the Hawaiian Islands; that defendant had an interest in the freight moneys. I pointed out to Mr. Kuppler that we had not been furnished with insurance on this ship as provided in the contract, and that we wanted some insurance that the vessel would be security for our claim. He said he would take up the matter of insurance and see what could be done; that the defendant company carried blanket policies; that he did not know whether it could be handled under that, but he would see what he could do. We then left there without anything more definite being accomplished—I then received a copy of a letter from Mr. Kuppler to the plaintiff dated May 19th, with copy of covering note from Johnson & Higgins of Washington."

Duplicates of the same were marked Plaintiff's Exhibit 3 and admitted, notwithstanding the de-

(Testimony of H. B. Jones.)

fendant making the same objections heretofore made. Defendant excepted to the ruling.

The witness further testified:

"I examined the covering note attached to the statement and did not think it was proper insurance protection, and thereupon wrote to the defendant company, attention Mr. Kuppler."

The witness thereupon produced a document, which was offered in evidence as a copy of said letter. The defendant objected, saying to the Court.

"May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?" [13]

To which the Court replied:

"Same objection may run to all. Proceed."

The document was thereupon marked Plaintiff's Exhibit 4.

The witness further testified:

"In that letter I notified the defendant that unless some action was taken to take care of our claim we would proceed to libel the vessel. I caused an inquiry to be made and ascertained that the ship was due to leave Galveston on the 4th of June. McLean and I then called on Kuppler about the last of May. I then told Kuppler we had firmly made up our minds we would not let the ship leave Galveston without libeling her for our bill. He said, 'Well, don't do that. We will have to take care of it in some way. We can't afford to have that ship libeled.' After some discussion he took

(Testimony of H. B. Jones.)

us over to Mr. Miller. Kuppler's office was on one side of the building and Miller's on the other. Miller was the manager of the defendant company here at Seattle. And Mr. Kuppler explained the situation to him. I told Miller we would not let the ship leave Galveston without libeling her for our bill. He was indignant, and said he thought we ought not to come there at that late date and put the matter up to him that way, that was wholly a surprise to him. I called his attention to our letter of the 20th of May, that has been identified, and told him that we had had the matter up with Mr. Kuppler and that I had written them telling them at that time what we were going to do if the bill was not taken care of. 'Well,' he said, 'I guess we have got to take care of it; we have got to take care of that in some way.' And he said, 'What are you going to insist on?' I told him that we were going to insist on the payment of the bill or guarantee of the bill. He then said he would like to have a day or two to refer the matter to his people, and I told him that we would give him time, I think it was about two days. It is my recollection that I asked Mr. Miller at that time if it was necessary for him to do that and he said that it was not absolutely necessary, but he would like to do it. Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. He said, 'We don't want to pay it by the 20th of June and we don't want to pay interest on it.'

(Testimony of H. B. Jones.)
I told him that matter rested with Mr. McLean, who was then in Portland. I gave Kuppler his telephone number or his address."

"McLean is the principal stockholder of the plaintiff corporation and the president of the company. He wired me about the 2d of June. [14] McLean said that anything that was satisfactory as a guaranty to the bank to enable them to raise money would be accepted; that I could act on anything that was acceptable to the bank, if I could put it in form acceptable to them. I went over to the First National Bank and told Mr. Philbrick what we were proposing to do. We determined to put it in the form of a trade acceptance, so I called Kuppler back and told him that Philbrick had suggested that the simpler way to handle it would be to put it in the form of a trade acceptance. Kuppler said for me to take it up with Mr. Josiah Thomas, who was then attorney for the defendant company, and if he were agreeable to it, it would be all right. I took it up with Mr. Thomas and explained what we proposed to do. Thomas subsequently said it was all right, to go ahead that way. So I prepared a trade acceptance, accompanied by an assignment of our claim, with detailed bills and a letter addressed to the bank, and stated to Mr. Kuppler that we would put the assignment of our claim in escrow with the bank with a letter authorizing them to turn the assignment over to the defendant company when the trade acceptance was paid."

(Testimony of H. B. Jones.)

The trade acceptance was then marked Plaintiff's Exhibit 5. The letter to the bank was marked Plaintiff's Exhibit 6 and the assignment Plaintiff's Exhibit 7. Plaintiff thereupon offered in evidence Exhibits 5, 6 and 7, the following colloquy being had:

"The COURT.—The same ruling. Objection noted the same as before.

"Mr. COSGROVE.—Yes, continue these same objections the same as before and exceptions to the Court's rulings.

"The COURT.—Yes."

"Mr. COSGROVE.—If the Court please, the objections and exceptions will run not only to the documents, but to the testimony of the witnesses?

"The COURT.—Yes."

The witness further testified:

"I took the trade acceptance, the assignment and this letter, Plaintiff's Exhibit 6, and called on Mr. Kuppler, at the defendant's Seattle office, and showed him the trade acceptance, the assignment that I had prepared, also letter to the bank. Mr. Kuppler figured the interest at $226.66 and added it in red ink on [15] the trade acceptance; also his own initials. Kuppler said they might want to pay this up sooner than the maturity date. Therefore, I inserted in the letter Exhibit 6 the words 'or sooner.' Kuppler took me over to Miller's office, explaining the situation to the latter, the way the amount was arrived at, the method I proposed to handle it by, putting the assignment

(Testimony of H. B. Jones.)

in escrow with the bank. The suggestion was made either by Kuppler or Miller that I should turn the assignment over to them absolutely inasmuch as they were giving us their trade acceptance. After some discussion I did so; I did not use the letter to the bank. The trade acceptance was then signed by Miller, who signed as Fairbanks, Morse & Company by C. R. Miller, agent. It was delivered to me and discounted by the plaintiff at the First National Bank. Later I was requested to release the interest of the plaintiff in the insurance policy under the rider that I have identified here, and as secretary of plaintiff company I signed a release of its interest in the insurance. The trade acceptance was not paid, although at maturity presented, dishonored and protested and has never been paid."

On cross-examination the witness testified:

"Our first conversation with Mr. Kuppler was about the middle of May.

"Q. I think you said that Mr. Kuppler in some of his conversations with you in April or May led you to believe that Fairbanks, Morse & Company might possibly take care of this claim of yours.

"A. Not in April. He did in May very distinctly. Our first conversation was about the middle of May.

"Q. Did Mr. Miller make any such statement?

"A. Mr. Miller did at the meeting that we had

(Testimony of H. B. Jones.)

with him, which was the last of May. We did not see Mr. Miller at the first meeting, the middle of May.

"We did not see Mr. Miller until the last of May. He said, 'Well, I guess— What can we do about it? I guess we have got to take care of this claim, haven't we?' and Mr. Kuppler said, 'Yes.'

"Q. Do you remember him asking you if you had not come down to get your pound of flesh?

"A. Well, he put it rather that way, that we were trying to squeeze them in this thing. He took the attitude that we were coming down there that morning without any previous notice and saying, 'Now, if you don't pay us right now, we are going to libel this ship,' and Mr. Miller was sore about it when we started to talk to him and then I pointed out to him that I had written that [16] letter of May 20th, which was at least a week before, and also that I had a talk with Mr. Kuppler and told him then what we were going to do.

"I do not remember showing the letter to him, but I know we talked about it. I told him I talked to Mr. Kuppler. I know I had that copy with me, and we did have it—I recall very distinctly that that was my answer to Mr. Miller's attitude, that we had written this letter a week or more before telling them exactly at that time what we were going to do, and there was no question at that time that the letter had been received.

"Q. Did you tell Mr. Miller in this conversation in the latter part of May if Fairbanks, Morse &

(Testimony of H. B. Jones.)

Company did not satisfy you in connection with your claim that you would libel the vessel?

"A. Yes, sir. I would not say we limited it to Fairbanks, Morse & Company. We said if our claim was not paid immediately we would libel the [17] vessel, and it was understood they were the only ones that were in a position to take care of it."

The witness further testified:

"In the fall of 1926, defendant company put Diesel engines in the 'Ethel M. Sterling' at the plant of the plaintiff. At the same time the plaintiff did certain other independent repair work. The vessel sailed from the dock about the 1st of January, 1927. At that time all of the work on the vessel, to which I have made reference, had been completed, nothing thereafter being done upon her and entering into this matter whatsoever. Our interest in relation to the vessel was the unpaid repair bill which was an obligation of the Sterling Steamship Company. We made no effort to libel the vessel for this unpaid bill before she left Seattle. Under the contract the steamship company had until March 1st to make this final payment. After the vessel left Galveston, she went to the Hawaiian Islands and was there libeled by the defendant company and bought in by it in the proceedings.

"Q. If Fairbanks, Morse & Company had obligated itself to pay the Lake Union Dry Dock & Machine Works this unpaid balance why was it necessary for you to tell Fairbanks, Morse & Com-

(Testimony of H. B. Jones.)

pany that if the matter was not taken care of you would libel the vessel?

"A. They did not tell us that until after I had made that statement anyhow."

The Court saying:

"I don't care anything about that. You can argue that to the Court."

The witness further testified:

"I knew Mr. Miller was the local manager of defendant company. At the time the trade acceptance was signed by Mr. Miller he did not tell me that he had no authority to sign, or that it was not worth the paper it was written on, and I did not tell him at the time that I would take a chance on it anyway. On the 2nd of June, Kuppler and I called upon Mr. Miller. Our previous conversation with Mr. Miller had been the latter part of May, at which McLean, Kuppler and I called on him.

"The plaintiff corporation, prior to June 2nd, 1927, had never had any experience in the matter of the sale of any claim to the defendant company, nor had it obtained any trade acceptance from anyone purporting to represent the defendant, and had no information which would [18] lead me to believe that Mr. Miller had ever previously accepted any trade acceptance. I knew in a general way that the defendant company was engaged in the manufacture and sale of machinery, particularly engines. I understood from Mr. Kuppler and Mr. Miller that they were keeping track of the vessel. They told me that she was to be in Galveston and

(Testimony of H. B. Jones.)

where she was going, and I understood they were collecting her freights and looking after her charters. Kuppler told me that originally, and then in the conversation with Miller that fact was developed, he speaking about the disadvantage to them through losing her charters, and it is possible he spoke of a damage suit. I understood they had an assignment of freights and whether they actually had a charter of the boat I won't be sure, but they certainly were supervising her every movement; they knew where she was going to be and where she was going to go and were interested in the operation of that boat—I suppose they were interested for the protection of their claim. They had about fifty thousand dollars in this boat and were interested in getting that money out. I did not know on June 2, 1927, and do not now recall any other pending business relations between the plaintiff and the defendant. If Mr. Miller had told me that the trade acceptance was no good I would have libeled that boat immediately, because it was then June 2d and I had time to libel the boat and that is what I proposed to do."

TESTIMONY OF WALTER R. KUPPLER, FOR PLAINTIFF.

WALTER R. KUPPLER, a witness for plaintiff, being sworn, testified:

"For about fifteen years prior to January 1, 1927, I was credit manager of the defendant at

(Testimony of Walter R. Kuppler.)

Seattle. I was a trustee and treasurer of the Sterling Steamship Corporation and helped organize the corporation and held the office of treasurer so that I could watch the funds, but that had no relation to the defendant company. Mr. Miller was the local manager of the Seattle branch, the branch extending over Washington, Oregon, Idaho, part of Montana and all of Alaska. The defendant company has a manager at San Francisco, Los Angeles and sub-managers at Portland and Spokane. The Pacific Coast manager of the defendant, Mr. A. W. Thompson, at that time had offices at Los Angeles covering the entire Pacific Coast as far east as Salt Lake."

"Q. So that Mr. Miller here reported to Mr. Thompson? [19]

"A. Yes, sir.

"In 1926 I had several conferences with Mr. Jones, the witness just testifying. The first conversation in reference to the claim of the plaintiff against the 'Ethel M. Sterling' was had at the offices of the defendant here. At that time Mr. Jones and Mr. Cutting or Mr. McLean called and wanted to know when they were going to receive the balance due on the work performed. They had been promised payments and the Sterling Steamship Company was not able to make them, and the balance due was the amount covered by the trade acceptance. Mr. Jones said that if the plaintiff's claim was not taken care of he was going to libel the ship at Galveston. I was rather surprised at

(Testimony of Walter R. Kuppler.)

the time, and immediately took it up with Mr. Miller, and the consequence was that Mr. Miller telegraphed to the Pacific Coast manager and got an answer back and when we got that answer we acted. I heard Mr. Jones' statement that the Fairbanks, Morse people recognized the validity and priority of the plaintiff's claim, and the statement was correct. I was elected by the Board of Trustees as treasurer of the Sterling Steamship Company to look after the funds of that corporation.

"The COURT.—Did Fairbanks, Morse & Company know that you were elected to that position?

"The WITNESS.—I don't know whether they did or not. I believe they did. The local manager would at least know.

"The COURT.—Did the furnishing of the engines for the ship by Fairbanks, Morse & Company have anything to do with your being elected to that position by reason of your being credit manager?

"The WITNESS.—I belive not."

Whereupon the witness identified the document marked Plaintiff's Exhibit 8 as the telegram referred to as having been received from Mr. Thompson. Upon its admission, defendant's counsel repeated to the Court that the defendant still took the position that neither Mr. Thompson nor Mr. Miller nor anyone else had any authority to issue trade acceptances or guarantees.

The witness then identified a letter from Miller to Thompson dated May 21st, which was marked as Plaintiff's Exhibit 9 for identification.

(Testimony of Walter R. Kuppler.)

The witness then testified:

"Mr. Miller handed me the telegram which I took to our attorneys, Messrs. Van Dyke & Thomas, in [20] Seattle. I wanted them to find out and advise me which was the best way of handling the account of the plaintiff.

"Q. I know. The choice between what two ways or three ways or—

"A. Well, the telegram had suggested a way of handling it and—or perhaps I am getting a little ahead of the story. I called up Mr. Jones and told him of the advice we had received and that we wanted additional time. He said McLean was in Portland and gave me his number, I called him up and told him we had received advice to guarantee the payment of the account, and wanted time. Later in the day I talked to Mr. Thomas of Van Dyke & Thomas, and he stated to me on the telephone that that was the simplest way to handle it by trade acceptance.

"Q. Did you acquaint him with all the facts in the matter?

"A. Well, he had saw the original telegram."

"I signed the trade acceptance on the margin in red ink. The signature to Exhibit "9" is Mr. Miller's signature."

It was then offered in evidence, the defendant making the same objection as to previous exhibits.

The witness further testified:

"The assignment of plaintiff's claim against the 'Ethel M. Sterling' was delivered at the time the

(Testimony of Walter R. Kuppler.)

trade acceptance was signed. I do not recall about the release of insurance made at that time."

On cross-examination the witness testified:

"I heard what Mr. Jones testified about my conversation with him in May. I told him that the plaintiff had preference, a lien there prior to our mortgage, and that it would have to be taken care of in due course. I did not tell him that the defendant would take care of that bill. I did not tell him we would pay them any cash, but I told McLean over the long distance phone that we would guarantee the account. I did not tell them that the defendant would pay the bill. I did not tell Mr. Miller that I had said to the plaintiff that the defendant would guarantee the account.

"I recollect the conversation the latter part of May between McLean, Jones, Miller and myself. At that time McLean and Jones called at my office and told us they were going to libel the ship at Galveston unless they received payment for the unpaid balance on plaintiff's claim, and I took them over to Mr. Miller's office and they repeated the same statement. Mr. Miller objected. [21] Neither Miller nor I at that time said to either of these gentlemen that the defendant would pay their claim. At that time neither one of us said to them that defendant would buy the claim. Mr. Miller made a remark like 'I guess you are demanding your pound of flesh right now,' and Mr. Jones replied, 'It amounts to about that, only we are willing to give you a few more days' time.' Miller

(Testimony of Walter R. Kuppler.)

said, 'I would like to take it up with our people,' meaning the other executives of the defendant company.

"In the latter part of May, all the original engine construction work had long since been over, and the work for which the plaintiff claimed $8000.00 for repair work had long since been done. There was not then pending any going business relations between the defendant and the plaintiff. On the 2d of June, when Mr. Jones was at the office of Mr. Miller, I was there. Jones had had the trade acceptance prepared and brought it over to my office, and we made some alterations in it and I O. K.'d it in the margin and we took it over to Mr. Miller and we told Miller all the details about it; that I had consulted with our attorneys and they had suggested it was the simplest way to handle it. This was the first time we had taken an assignment of an account as large as this. We had taken similar assignments of smaller accounts sometimes to protect mortgages on other little boats that amounted to perhaps a few hundred dollars or less. They were not many; over a period of years perhaps a few. I can recall one—an account up in Everett during the time while Miller was manager. I do not recall any other such occasions. I do not recall any occasion when the defendant bought any claim for any other reason. I never knew of the defendant accepting any trade acceptances. This was the first time a trade acceptance was negotiated here to my knowledge. I do not recall any notes being

(Testimony of Walter R. Kuppler.)

made by any manager or other representative of the company in Seattle. I do not recall as to notes but I do as to warrants, small warrants, school districts and water districts throughout the state; the arrangement at the First National Bank here at Seattle was that they would accept Mr. Miller's endorsement as agent on amounts not to exceed five hundred dollars and there were several of those.

"Q. Several; what do you mean by several?

"A. Well, many of them every month, many warrants in small denominations that we would deposit the same as checks and the bank would carry that paper.

"Q. Larger amounts than five hundred dollars?

"A. Not to my knowledge. My recollection is that that was the limit. Anything in excess of [22] that amount was sent to Chicago.

"Q. Who put the limit on them; Chicago?

A. No; the bank itself. They did that as a matter of convenience to us.

"On the 2d of June the trade acceptance was delivered to Mr. Jones and the assignment of accounts taken. Jones said he would put the letter in escrow until the trade acceptance was paid. Mr. Miller said it would be just as well to retain that in our vault here in Seattle." [23]

"I do not recall Miller making any protest against executing the trade acceptance. I do not recall him telling Mr. Jones prior to his delivery of the trade acceptance that he had no authority to sign it.

(Testimony of Walter R. Kuppler.)

"Q. Is it possible that it may have been said and slipped your memory?

"A. That might be possibly true, yes, sir.

"Q. What was the limitation, if you know, of the local manager in the execution of sales contracts?

"A. Why, he would approve contracts up to five thousand dollars—and copies of those contracts would go to the home office as well as to the Pacific Coast Manager's office at Los Angeles at that time. Beyond that between five and ten, they must have the approval of the Pacific Coast Manager, at Pacific Coast Manager's headquarters, and in excess of ten thousand they had to go to Chicago as well as to the Pacific Coast Manager, but the contracts regardless of the amounts are always approved by the local manager after they O. K.'d or initialed by the other higher executives if they succeed, regardless of the amount."

TESTIMONY OF J. L. McLEAN, FOR PLAINTIFF.

J. L. McLEAN, a witness for plaintiff, being sworn, testified:

"I am the president and one of the stockholders of the plaintiff company. I remember the transactions which have been testified to with reference to the 'Ethel M. Sterling' and the account that plaintiff had against the Sterling Steamship Company and negotiations between ourselves and Mr. Jones in our behalf and the defendant corporation.

(Testimony of J. L. McLean.)

I went down on two occasions in the early part of May with Mr. Cutting and interviewed Mr. Kuppler and told him that the balance due on this job had been delinquent since the 1st of March and we needed the money very badly, and wanted to get some specific definite knowledge just where that money was coming from, for the reason that Mr. Kuppler had represented to our company and to Mr. Cutting that we need have no fear, that the defendant was furnishing some thirty or forty or fifty thousand dollars' worth of engines for this boat. Mr. Kuppler was an officer of the Sterling Steamship Company and supervising charter parties, and I recall this conversation on two occasions that when these moneys were paid over and came into his possession he would see to it that we were properly taken [24] care of. I should say he was speaking of himself in a dual capacity for the defendant as well as the Sterling Steamship Company. We were not satisfied at the delay attached to these payments and insisted that defendant, being a large national outfit and having such a large claim against the vessel, could well afford to take care of our little claim and be in full control of the boat, as well as supervising its charter parties and operations through the Sterling Steamship Company, of which their credit manager was also an officer. We did not get very far with Mr. Kuppler other than to have his assurance and good offices. Then I took it up with our attorney and secretary, Mr. Jones, and told him we would have

(Testimony of J. L. McLean.)

to press the matter. This resulted in Mr. Jones, Mr. Cutting and myself calling on Mr. Kuppler the latter part of May. Jones had the information at that time as to when the vessel would arrive at Galveston. We told Kuppler we intended to protect ourselves when that ship got to Galveston, but that we wanted to be decent with the defendant and give them an opportunity to come in and pay us up and take an assignment of our claim because we had to make a large payment of June 20th. Kuppler took us over to see Mr. Miller, the local manager. Jones stated our case as I have recited it, upon which Mr. Miller remarked to Mr. Kuppler, 'Well, Mr. Kuppler, if we don't do something with this matter what will happen to us?', to which Kuppler replied, 'Well, these gentlemen will libel the vessel.' Following that Miller wanted to know how much time he could have as he wanted to take the matter up with his people, and Jones said he would give him two days longer. In the meantime I went to Portland. On June 2d Kuppler called me on the phone and said, 'Fairbanks, Morse are going to guarantee your claim, but we want more time and we don't want to pay any interest.' I told him that we didn't object so much to time if the guaranty was acceptable to the First National Bank and our attorney; that Mr. Cutting might have to borrow money to make the payment referred to on the 20th. I then wired Jones. That about concludes my negotiations in reference to this claim until it was repudiated by the defendant. When

(Testimony of J. L. McLean.)
Jones and I had the conversation with Mr. Kuppler, with Mr. Miller present, Mr. Jones referred to his letter of May 20th. I do not remember whether Jones had a copy of the letter with him at the time or not."

On cross-examination the witness testified:

"Q. Now you said something about Mr. Miller telling you on about May 31st that he wanted to take this up with his people? Did he say who his people were?

"A. Why, he didn't have to. I thoroughly understood that as being his superiors.

"Q. What superiors; did he tell you who they were?

"A. No, I didn't care. I thoroughly understood that was his superiors when he said his people. [25]

"Q. I was trying to find out from you if you knew what superiors, what their names were.

"A. No. I didn't question that at all.

"Q. Did he tell you whether they were in San Francisco or Chicago?

"A. No, I didn't inquire or he didn't state.

"The method of receiving our money was entirely too slow, and I wanted either Mr. Kuppler to speed up the collection of the moneys or have the defendant formally take over the whole matter. It was my judgment that he was representing the defendant and the Sterling Steamship Corporation. The defendant had a large sum of money in the vessel and Kuppler was the credit

(Testimony of J. L. McLean.)

manager of the defendant and an officer of the Sterling Steamship Corporation 'all of which undoubtedly must have been known to Fairbanks, Morse.'

"Q. Of course you are making your guess. During all this time the Sterling Steamship Corporation owed you this money, didn't it?

"A. We so carried the account on our books, to be sure, Sterling Steamship Company, because that is the way the contract was signed.

"During the time of my conversation with Mr. Kuppler down to June 2d I knew that Mr. C. R. Miller was the local manager of the defendant, although I never met him until the meeting in the latter part of May. In the past ten or fifteen years I have represented many different corporations as liquidator. During that time I have known of the defendant company, and generally knew the kind of business it carried on, that is, the manufacture of gas engines, pumps and scales."

TESTIMONY OF OTIS CUTTING, FOR PLAINTIFF.

OTIS CUTTING, a witness for plaintiff, being sworn, testified:

"I am the vice-president and general manager of plaintiff, and was in touch with Mr. Kuppler from the beginning of the work or before the work started In the month of May, 1927, we had been assured by Mr. Kuppler that the account would be taken care of—of course in a general way—

(Testimony of Otis Cutting.)
there was no definite statement made as to who was going to take care of it—long before that time. At the time when Mr. Jones, Mr. McLean and Mr. Kuppler called on Mr. Miller the latter part of May, Mr. Jones had his copy letter of May 20th with him I remember it very distinctly." [26]

On cross-examination the witness testified:

"At the conversation just referred to Mr. Miller was quite provoked at this matter coming up so soon, and Exhibit 42 was referred to at the time as having taken place previously. Miller picked it up and glanced at it and laid it down. It was not read to him. Mr. Jones had it in his hand and took it away with him."

TESTIMONY OF WILLIAM J. SMITH, FOR PLAINTIFF.

WILLIAM J. SMITH, a witness for plaintiff, being sworn, testified:

"I am superintendent for the City of Seattle of the Western Union Telegraph Company, served with a subpoena to bring up certain telegrams, and I object to the introduction of these telegrams unless ordered by the Court to present them."

The Court thereupon directed to witness to proceed. These papers were marked Plaintiff's Exhibits 10, 11, and 12, to which defendant made the same objections as to previously admitted exhibits, the Court saying:

"Yes. Admitted."

TESTIMONY OF HARRY R. SANDERSON, FOR PLAINTIFF.

HARRY R. SANDERSON, a witness for plaintiff, being sworn, testified:

"I am manager in Seattle of the Federal Telegraph Company, served with a subpoena to produce certain telegrams. I have one here which is a private one and I would like to have the Court rule an order for it."

To which the Court ordered:

"Produce it."

It was marked Plaintiff's Exhibit 13 and offered in evidence.

Whereupon the plaintiff rested. [27]

TESTIMONY OF A. W. BOUGHEY, FOR DEFENDANT.

A. W. BOUGHEY, a witness for defendant, being sworn, testified:

"I live in Chicago, Illinois. I have been secretary of the defendant company for twenty-five years, and at intervals secretary and treasurer and secretary and comptroller. As such official I have had charge of all the general financial and accounting operations of the company which began business in 1858 in Chicago. The character of its business is the manufacture of Diesel engines, scales, steam pumps, electrical equipments and the sale of those products. They are distributed throughout the country through local sales offices, 26 or

(Testimony of A. W. Boughey.)
somewhere thereabouts and five or six abroad. As secretary of the defendant company I am familiar with its charter and by-laws which have been and are in my custody. I now have the minute books of the corporation with me. I have prepared a copy of the by-laws of such corporation in effect on June 2, 1927."

Upon stipulation of counsel, the copy was treated as the original. It was marked Defendant's Exhibit "A-1" for identification.

"I know the authority of the Seattle manager during the year preceding June 2, 1927. My knowledge was predicated upon my association as director and secretary of the defendant for nearly twenty-five years. There is no written record of the authority. The business for the defendant at Seattle was done through the local sales manager, C. R. Miller, who was in charge of the local sales office. He sold the goods for us and looked after the installation of the goods, looked after the servicing of the goods and collected the proceeds and paid the proceeds into a treasurer's account in a local bank here that we in Chicago drew against and he could not draw against; that ended the transaction. When he wanted any money he wrote a letter to Chicago every week specifying how much money he might require for the next week, and we opened a local account in his name under which he paid those remittances and against which he drew checks for expenses for freight, that is including his salesmen's wages and his office help;

(Testimony of A. W. Boughey.)

all that money was obtained from Chicago upon his written requisition."

The Court inquired:

"When goods were sold and not paid for in cash, who arranged for the security or payment? [28]

To which the witness replied:

"If the local manager did not collect in cash he got a note and those notes would be sent to Chicago for endorsement or for discount by them. He had absolutely no right to discount notes here or sign endorsements, and never did.

"Not to my knowledge did the company purchase any claims against other people through the local office."

The witness was handed a letter from Fairbanks, Morse & Company by W. R. Kuppler, dated June 10, 1927, which arrived in Chicago June 14, 1927.

"This letter was considered by the president, general credit manager, vice-president and treasurer and myself. Mr. Kiddoo was the vice-president and treasurer of defendant and the general credit manager's name was F. C. Dierks, who held these positions in June and July of 1927. Upon receipt of the letter just mentioned Mr. Dierks and Mr. Kiddoo made a visit to Seattle to investigate the whole matter and discussed what was the best thing to settle the whole matter; that is what they came for, to settle the whole matter after they had ascertained all the facts. At the time said letter of June 10th came in, the home office had not had

(Testimony of A. W. Boughey.)

any knowledge of any trade acceptance such as the one pleaded in the complaint.

"Q. Did the Seattle office, the Seattle manager, at any time during your experience with the company prior to June 2, 1927, accept any trade acceptance?

"A. No.

"Q. What, if any, was his authority in the matter of purchase of claims, if any?

"A. He would have no authority to purchase claims on his own responsibility."

At this time the letter of June 10th, referred to by the witness, was marked Defendant's Exhibit "A-2" and admitted. Defendant then offered in evidence Defendant's Exhibit "A-1" for identification. It was admitted, the plaintiff first objecting upon the ground that it was incompetent, irrelevant—and then stating:

"There is no objection on the ground that it is not the original." [29]

The witness further testified:

"The letter of June 10th is the first information I had in connection with the trade acceptance mentioned in plaintiff's complaint; if it had been brought to the attention of any of the officers of the home office prior to June 10th, it would have come to my attention. The company's records, including minute books and by-laws are kept in Chicago. Exhibit 'A-1' is made from such records."

TESTIMONY OF C. A. PHILBRICK, FOR DEFENDANT.

C. A. PHILBRICK, a witness for defendant, being sworn, testified:

"I am the vice-president of the First National Bank of Seattle, having been such for about five or six years. I know Mr. Harry Jones, J. L. McLean, C. R. Miller, the defendant and the plaintiff. Prior to June 2, 1927, the defendant was a depositor of said bank, maintaining two accounts—one kept by the branch house at Seattle in the name of Mr. C. R. Miller, Manager. The defendant carries its general account in which deposits go for its credit, and then there is another account which is carried in the name of C. R. Miller that is reimbursed by remittances from Chicago. The bank had written instructions from the home office or from the principal officials of the defendant relative to these accounts. I knew prior to June 2, 1927, that the home office of the defendant was in Chicago. The bank had from the defendant instructions relative to who might sign paper which was to be transferred through these accounts."

The defendant identified Defendant's Exhibit "A-3," offered it in evidence, to which plaintiff objected and the objection was sustained, to which ruling defendant took an exception.

The witness further testified:

"I had a conversation with Mr. Harry Jones during the month of May, 1927, relative to the

(Testimony of C. A. Philbrick.)

matter of procuring a guarantee from the defendant for the amount which was owed the plaintiff from the Sterling Steamship Corporation. Mr. Jones asked me what form of guarantee could be used, guaranteeing a certain sum to be guaranteed by the defendant, and I told him that I thought the best form would be in the nature of a trade acceptance. I told him that the acceptance should be accepted by the defendant [30] by an authorized officer of the company. I told him that the paper we had had in the past had always been endorsed by Fairbanks, Morse & Company by Mr. Miller, treasurer of the company at Chicago, which Mr. Miller is not Mr. C. R. Miller. At this conversation Jones had with him a telegram from Mr. McLean."

The witness identified a letter to the bank of date July 7, 1927, testifying:

"It was received by the bank about July 7, 1927."

It was marked Defendant's Exhibit "A-4," offered and admitted in evidence.

"The bank discounted the trade acceptance (Plaintiff's Exhibit 5) and gave the plaintiff credit for it shortly after it was issued."

TESTIMONY OF WALTER R. KUPPLER, FOR PLAINTIFF (RECALLED—CROSS-EXAMINATION).

WALTER R. KUPPLER, a witness for the plaintiff, by the consent of counsel and the Court, was recalled for further cross-examination, testifying:

"Prior to May 13, 1927, I had five thousand dollars stock in the Sterling Steamship Corporation. I did not have any stock at the time the letter of June 10th was written.

"Q. Did you inform Mr. Miller of your ownership of that five thousand dollars' worth of stock?

"A. I believe not."

On redirect examination, the witness testified:

"Q. Was your relationship with the Sterling Steamship Corporation in any measure or in part in order to enable you to protect or take care of the interest of Fairbanks, Morse & Company?

"A. I always considered it so, yes, sir."

TESTIMONY OF C. R. MILLER, FOR DEFENDANT.

C. R. MILLER, a witness for defendant, being sworn, testified:

"I am and have been since August 24, 1919, local manager of the defendant at Seattle. I know Mr. Harry Jones, Mr. J. L. McLean, Mr. Philbrick, Mr. Kuppler and Mr. Boughey, [31] witnesses who preceded me. During this period the kind and

(Testimony of C. R. Miller.)

character of business of defendant as conducted at Seattle, Washington, was the selling of merchandise manufactured by the several factories of the defendant; that consists of engines, pumps, motors, scales, and some auxiliary equipment. The home office of the defendant is Chicago. The make-up of my own office as a part of defendant's organization we have a manager, department manager, salesmen in charge of the different departments; the engine and pump departments have a man in charge, and we have a credit manager. The salesmen covering the various parts of the territory work and report directly to the office, and the records are kept by the accounting department and the orders are handled and executed by the order department. I was the active controlling head of this branch during 1926 and 1927. My duties were to see that the goods were sold and installed, if sold that way, and the necessary service given them; also to see to it that the accounts were collected and the records kept.

"Q. To whom did you report, if to anyone,—to whom did you make reports of your business?

"A. Well, I reported to Mr. Thompson, Mr. A. W. Thompson, the Pacific Coast Manager, at that time located at Los Angeles.

"We sent our statement of accounts to the home office. To pay our expenses it was necessary for me to obtain our money from the Chicago office, and that was done in the form of a requisition. They would send me a check and I would deposit

(Testimony of C. R. Miller.)
it in an account in the First National Bank. I did not have to go through Mr. Thompson for that. This account was in the bank carried under my name as agent. The moneys received from collections were deposited in the same bank in the name of the defendant, what we called a corporation account, over which I had no control whatever. It was a home office account. During my managership at Seattle we purchased no claims and never accepted any trade acceptances except the one in question. During this time the credit manager, as Mr. Kuppler, whose duty it was to pass upon the credit standing of the customers who made purchases from us; also to make the collections. In addition to that he did some accounting, kept the general ledgers of this office. I remember the installation of engines in the 'Ethel M. Sterling.'

"Q. There was something said here about a contract between Fairbanks, Morse & Company and the Sterling Steamship Corporation for the installation of those engines? Do you recollect such a contract? "A. Yes, sir.

"Q. Do you know who initiated that?

"A. That contract was made by Mr. Whitehead, A. S. Whitehead. [32]

"Q. Made by him; do you mean it was brought into the office by him?

"A. Well, I don't know who brought it in. I presume he brought it. He made the contract, signed the contract.

(Testimony of C. R. Miller.)

"Q. You do not mean he was the man who signed it?

"A. Yes; I am quite sure that is right.

"Q. Now, coming over to the period between the 1st of January, say, 1927, and the 31st of May, 1927, you heard Mr. Kuppler's testimony—or Mr. Jones' testimony and Mr. McLean's testimony to the effect that Mr. Kuppler had told them that Fairbanks, Morse & Company would have to take care of this unpaid balance of the Lake Union Company?

"A. I heard the testimony. [33]

"Q. Was that statement made upon your authority? "A. No, sir."

"I did not know Mr. Kuppler had made any such assurances or conversations with these gentlemen. I didn't know anything about Kuppler's ownership in the stock of the Sterling Steamship Corporation. I recollect the conversation between Mr. Harry Jones and Mr. McLean and myself on the 31st of May, 1927, in my office. Mr. McLean, Mr. Cutting, Mr. Jones and Mr. Kuppler came in. Kuppler told me that the Sterling Steamship Company owed the Lake Union Dry Dock Company some eight thousand dollars and that these representatives of the Dry Dock Company were there to get the money—this was the first I knew of any indebtedness of that kind, and I was surprised they came down there to get the money and told them so. I told them that if they wanted to collect that money they would have to go to the Sterling Steamship Company.

(Testimony of C. R. Miller.)

Mr. Jones stated that they could not get any money from the Sterling Steamship Company; they came down there to get it from us or a guarantee. I explained that I could not give them a guarantee. I could not pay them the money nor could I give them a guarantee because it would take an action of the Board of Directors to authorize me to do anything like that. Mr. Jones stated that if we would not give them a payment or guarantee they would libel the vessel, which was then at Galveston I think loaded with cargo consigned to Honolulu. Mr. McLean explained why they were down there after the money. It was because they owed a certain amount and had to have it; that the defendant was a strong concern and could afford to pay it, while it was a small concern and could not. I told him that did not interest the defendant. This obligation was between the Sterling people and Lake Union Dry Dock, but Jones said the Sterling people already owed us a considerable sum, that we would have to pay it or he would libel the ship and force us to pay it. There had been an arrangement made to assign to the defendant the freight money covering this cargo, which Mr. Jones knew, and I asked him if the boat being loaded with sulphur and the freight money assigned to us, if that made us responsible in any way for the operation of the ship or any damages that might come up by reason of delay that would follow a libel proceeding, and he said that it would. Kuppler also advised me we would be liable. I didn't know myself, but I took

(Testimony of C. R. Miller.)

their word for it. It was my understanding that the defendant would be liable on account of this vessel being loaded.

"Q. What, if anything, was said at that time by anyone relative to the Lake Union unpaid balance against the Sterling Steamship Corporation being a prior lien agains the vessel, that is prior to the preferred [34] mortgage of Fairbanks, Morse & Company?

"A. I asked about that too, and I was told that it was a prior lien by Jones and Kuppler, and was also told the same over the phone by our then attorney, Mr. Thomas.

"After he told me about the damages, that we would be liable for damages, I told him that it would be necessary for me to take the matter up with our people, and he said, 'You will have to do it promptly because I am going to have this settled right away.' I said, 'It will take all night to get a telegram through,' and he said 'I have got to be out of town to-morrow and I will give you two days to settle,' and I said, 'Well, it looks to me as though you gentlemen waited until this vessel has been loaded and then you come down here to demand your pound of flesh,' and Mr. Jones said, 'That is just about right, I thought you would be smart enough to understand that.' I sent a telegram to Mr. Thompson and I received a reply inquiring if our mortgage was not prior to these claims in accordance with the Jones Act. I discussed it again with Mr. Kuppler and advised that

(Testimony of C. R. Miller.)

it was a prior claim, and I wired Mr. Thompson again that it was a prior claim. He wired back to me the next day, which telegram I gave to Kuppler, and I think Mr. Jones came back that day—he and Mr. Kuppler came to my office and laid down this trade acceptance, which is Plaintiff's Exhibit '5.' Kuppler said our attorney advised this trade acceptance was the right way to handle the situation. I then called up Mr. Thomas on the phone and asked him about it and he said he understood the situation and that it was the proper thing to do. After he so advised me, I signed it. As I signed the acceptance I told Mr. Jones I had no authority to sign paper like that and did not think it was any good. That was when I handed it to him. He said, 'Well, that is all right, I will take it anyway.' He said, 'Here is an assignment of the claim, which I will place in the bank, and then said, 'No; I have the acceptance and I might as well leave it here,' and laid it on the table and went out. That assignment is Plaintiff's Exhibit '7.' This is the only one I had and it was turned over to Mr. Cosgrove in July.

The witness was handed certain exhibits for examination, thereafter testifying:

"I never before saw Plaintiff's Exhibits 1, 2, 3 and 4."

"Q. Something was said yesterday by Mr. Kuppler I believe that Exhibit '4' was exhibited at the time of the conversation between yourself and Mr. Jones. Was it exhibited?

(Testimony of C. R. Miller.)

"A. No. I never saw it before.

"I never before saw Plaintiff's Exhibit 6. I did not know anything about any insurance [35] being placed by or through my office on account of any interest of the Lake Union Dry Dock & Machine Works in the vessel 'Ethel M. Sterling.' "

On cross-examination the witness testified:

"Q. You had a mortgage on the vessel, didn't you? "A. Yes.

"Q. And you were vitally interested in the vessel proceeding on her voyage and earning her freight, weren't you?

"A. We were interested in getting our money.

"Q. And they had a lien on this ship and your attorneys had advised you it was prior to yours and they could go ahead and foreclose the lien and stop the ship right in Galveston, that was what interested you, wasn't it?

"A. No, it was not.

"I do not remember taking any assignment of claims against the 'Oliver H' owned by James H. Hawthorne of Everett, to protect a mortgage."

The plaintiff produced a copy of a letter, which was stipulated by the parties to have been received by the plaintiff in the due course of mail about its date. It was admitted in evidence as Defendant's Exhibit 4.

TESTIMONY OF HERMA ANDERSON, FOR DEFENDANT.

HERMA ANDERSON, a witness for the defendant, being duly sworn, testified:

"I am stenographer to Mr. C. R. Miller, having been such for the last six years and two months. My desk is just outside Mr. Miller's office; there is just a glass partition that separates us, which does not reach to the ceiling. I have heard all of the testimony in this case. I recollect Mr. Jones and Mr. Kuppler calling on Mr. Miller on the 2d of June, 1927. Mr. Kuppler and Mr. Jones came in with the trade acceptance and asked Mr. Miller to sign it. He said 'I have no authority to sign this document.' Mr. Jones said, 'Well, I will accept your signature,' and Mr. Miller signed it, but as he did so he said, 'I have no authority to sign this document and it is no good.' Mr. Jones said he would accept his signature and that was the end of the conversation, and Mr. Jones left the office directly after." [36]

On cross-examination the witness testified:

"Mr. Jones was in the office this last time a very short while. I am not sure that I have stated all of the conversation that took place, and I do not know whether I was at my desk all of the time he was there, but that is all the conversation I heard. I do not remember just when he came in."

Whereupon the defendant rested.

TESTIMONY OF H. B. JONES, FOR PLAINTIFF (RECALLED IN REBUTTAL).

H. B. JONES, a witness for the plaintiff, was recalled in rebuttal, testifying:

"Q. Mr. Jones, you heard Mr. Miller's testimony with reference to what he said to you about the validity of his signature and so forth and so on?

"A. Yes.

"Q. What was said, if anything, in that respect?

"The COURT.—Did he make that statement?

"A. He did not make that statement. He asked Mr. Kuppler if it was all right to go ahead and sign this trade acceptance and Mr. Kuppler said it was. And with relation to the time when the assignment was delivered, that assignment was delivered before the trade acceptance was signed.

"Q. Was any objection made to delivery of it in consideration of the acceptance being signed?

"A. Absolutely. Before the acceptance was signed my recollection is that Mr. Kuppler first made that suggestion to me, but it might have been made by Mr. Miller, that they wanted the assignment delivered to them absolutely, and there was considerable discussion about that and after that discussion I finally said, 'All right, I will turn the assignment over to you absolutely instead of putting it in the bank.'

"Q. How long was this conversation the last time?

"A. The last time I went in there when the trade

(Testimony of H. B. Jones.)
acceptance was signed it was fully a half hour. I went into Mr. Kuppler's office first and we discussed it for I should think possibly ten minutes and then we went in Mr. Miller's office and we were in there fifteen or twenty minutes.

"Q. I think you testified, didn't you, that you did refer to this letter that you had written to them on the 20th?

"A. That was at the preceding conference that we had when I told them that I would give them two days to get some action on this thing and at that time Mr. Miller was taking me to task for coming down there and springing it on them suddenly, and I remember very distinctly telling Mr. Miller that I did not consider that it was sudden, that I had [37] written them on the 20th, and my best recollection is that I had the copy of the letter in my hand and either showed it to him or read him a portion of that letter. I recall very distinctly referring to that letter. It was addressed to Fairbanks, Morse & Company."

TESTIMONY OF WALTER R. KUPPLER, FOR PLAINTIFF (RECALLED IN REBUTTAL).

WALTER R. KUPPLER, a witness for the plaintiff, being called in rebuttal, testified:

"There is a partition about ten feet high between Mr. Miller's office and Miss Anderson's desk; a glass partition, the upper half. Her desk was

(Testimony of Walter R. Kuppler.)

one or two feet away—possibly about eight to ten feet from Mr. Miller's desk.

"Q. Was it easy to hear over that partition?

"A. Well, it is rather noisy. It is right in the store. It is rather noisy there with customers in there all the time, but it is possible to hear over it very easily." [38]

The exhibits hereinbefore mentioned are as follows:

Plaintiff's Exhibit 1 is a letter, on letter-head of the Sterling Steamship Corporation, dated April 6, 1927, to Lake Union Dry Dock & Machine Works, signed by Sterling Steamship Corporation, by W. R. Kuppler, treasurer, reading:

PLAINTIFF'S EXHIBIT No. 1.

"We enclose herewith the following checks on the American Exchange Bank in your favor aggregating $4076.90.

"Check #166 $393.56; check #167, $1977.13; check #169 $1706.21. This makes a total of $19,-876.90 paid to you during the past few months and I want to express to you our appreciation for the manner in which you have helped in taking care of this new organization.

"We want to particularly thank your Mr. Otis Cutting, Vice-president and General Manager, and your President, Mr. J. L. McLean.

"This then leaves a balance of $8208.25. $208.25 of this balance we understand represents invoice

against 'Bert E. Haney' and $8000.00 balance upon the 'Ethel M. Sterling' formerly 'Hawaii.'

"While there was some question in Captain Sterling's opinion about the first bills against the 'Hawaii' amounting to something like $4000.00 we are not going to question the correctness of same although they seemed high, for the reason that the courteous treatment received during the past several months and in connection with the remaining balance of $8000.00 upon the 'Ethel M. Sterling' we want your co-operation and we believe that this balance will be liquidated in the following manner: $4000.00 on or before August 10th, 1927; balance of $4000.00 on or before December 10th, 1927.

"You understand that Fairbanks, Morse & Company are extending terms of payment on the 'Ethel M. Sterling' for a period of three years and the writer made a trip to Chicago in connection with this sale and that your contract work, plus extras ran beyond everyone's estimate and for that reason we believe that we can look forward to your cooperation in paying this account as recited above and in view of the fact that you have received more money, namely $19,876.90 than any other company.

"Will you please send us a new set of bills in triplicate for the work done upon the 'Oregon Fir' all upon one bill for $1706.21 billed against the 'Oregon Fir' and owners, marked paid, as it is necessary for us to take legal action to reimburse ourselves in connection with this work.

"Thanking you for your acknowledgment in due course, we are," [39]

Plaintiff's Exhibit 2 is a contract between the Lake Union Dry Docks & Machine Works, by Otis Cutting, General Manager and Treasurer, and Sterling Steamship Corporation, by Ray M. Sterling, President, by W. R. Kuppler, Treasurer, dated October 14, 1926, wherein the Lake Union Company agrees to complete certain work on the steel schooner "Hawaii" upon certain terms reading:

PLAINTIFF'S EXHIBIT No. 2.

"There is now due and owing $4022.06 for work already accomplished on the 'Hawaii.' This together with said $11700.00 makes a total of $15722.-06, of which it is agreed that the owner will pay $10,000.00 on or before November 25, 1926, and the balance on or before March 1, 1927. The cost of any additional work performed by contractor shall be paid upon completion of work and before vessel leaves Port.

"It is further agreed that the owners shall carry insurance on said vessel in a reliable company for an amount sufficient to protect our account and made payable in event of loss to the Lake Union Dry Dock & Machine Works."

Plaintiff's Exhibit 3 purports to be a letter from Fairbanks, Morse & Co., by W. R. Kuppler, Credit Manager, to Lake Union Dry Dock & Machine Works, dated May 19, 1927, to which there is attached a copy of a purported letter from Johnson & Higgins of Washington, Inc., to Sterling Steam-

ship Corporation, dated May 18, 1927, re M/B "Ethel M. Sterling," the former letter reading:

PLAINTIFF'S EXHIBIT No. 3.

"In accordance with talk with your Mr. John L. McLean, President, and H. B. Jones, attorney under date of May 13th, at this office, we have placed $20,000.00 additional insurance upon the motor vessel 'Ethel M. Sterling' as per copy of letter from Johnson & Higgins of May 18th enclosed herewith, wherein loss is payable to Fairbanks, Morse & Company and the Lake Union Dry Dock & Machine Works as their respective interests may appear.

"Above for your information. A copy of this letter, together with copy of Johnson & Higgins letter of May 18th to the Sterling Steamship Corporation has also been mailed to Mr. H. B. Jones, your attorney. [40]

"Thanking you for all past favors extended to the Sterling Steamship Company and to Fairbanks, Morse & Company in the past, we are,"

The attached letter reading:

"As per your instructions we have placed $20,000.00 insurance on the hull only of this vessel, excluding the engines and Fairbanks, Morse standard equipment, attached at 9:00 A. M., Pacific Standard time, May 18, 1927, on the free of damage absolutely form as enclosed, but excluding the running down clause and on a valuation of $100,-000.00 on hull only. The loss is made payable to Fairbanks, Morse & Company and the Lake Union

Dry Dock & Machine Works as their interests may appear. * * * ''

Plaintiff's Exhibit 4 is a letter purporting to be from Bronson, Jones & Bronson to Fairbanks, Morse & Co., attention Mr. Kuppler, dated May 20, 1927, reading:

PLAINTIFF'S EXHIBIT No. 4.

"I beg to acknowledge receipt of copy of your letter of May 19th to the Lake Union Dry Dock & Machine Works regarding the M. V. 'Ethel M. Sterling,' and the officials of the company have today had a meeting to consider this matter.

"The contract that was entered into with the Sterling Steamship Company, as you no doubt know, provided that payment of the full contract price should be made on or before March 1st, and payment of the extras upon completion of the work and before the sailing of the vessel. It also provided for insurance to protect the account with loss payable to the Lake Union Dry Dock & Machine Works.

"In the absence of the documents, it is, of course, impossible for me to entirely understand the character of the insurance mentioned in your letter, but it seems to us that it really does not afford proper protection. In the first place, as we understand it, you have a balance of $20,000.00 or more that is not now covered by insurance so that, in the event of loss under this policy, we would have to prorate with you and, therefore, the insurance is not adequate in amount. In addition to this,

the character of the insurance is so limited that we do not consider it affords adequate security for the claim.

"As Mr. McLean explained to you at our conference, the company has borrowed from its bank under the assurance that this balance would be paid in accordance with the contract, and it must absolutely have the funds in hand not later than June 20th to meet an obligation maturing on that date, and, even with a satisfactory policy, they would now want to be assured of its receipt within that time. If you can make an arrangement which will insure this result, [41] they will be willing to let the matter ride until that time.

"Will you kindly advise us at once whether such an arrangement can be made as they feel that the matter must be definitely disposed of immediately."

Plaintiff's Exhibit 5—the trade acceptance, is in words and figures as follows:

PLAINTIFF'S EXHIBIT No. 5.

"No. ———. Date June 2, 1927.

$8000.00

On Sept, 20, 1927, pay to the order of the undersigned Eight Thousand and No. ———, Dollars, together with six per cent interest thereon from March 1, 1927, amounting to $266.66. Value re ceived and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS.

By OTIS CUTTING, Treasurer.

H. B. JONES, Secretary.

To Fairbanks, Morse & Co.
Seattle, Wash.
O. K.—KUPPLER.
Accepted: 6/2/1927.
Payable at ———.
(Specify Bank or Address.)

FAIRBANKS, MORSE & CO.
By C. R. MILLER, Agent." [42]

Plaintiff's Exhibit 6 purports to be a letter from Lake Union Dry Dock & Machine Works, by Otis Cutting, Treasurer, and H. B. Jones, Secretary, to the First National Bank of Seattle, attention Mr. Philbrick, dated June 2, 1927, reading:

PLAINTIFF'S EXHIBIT No. 6.

"We are handing you herewith assignment of our claim and rights against the motorship 'Ethel M. Sterling' and the Sterling Steamship Company, as owner thereof, arising out of our repairs to said vessel, on account of which there is due a balance of $8,000.00, with interest at six per cent from March 1, 1927.

"In order to prevent our libeling said vessel before her departure from the port of Galveston on or about June 4th, where she is now loading, Fairbanks, Morse & Company, which has certain mortgage and lien claims against said vessel and, desirous of her fulfilling per present charter, has agreed to guarantee the payment of our account with six per cent interest from March 1, 1927, on or before September 20, 1927, and pursuant to such

arrangement has executed a trade acceptance. Upon payment of such trade acceptance, according to the terms thereof, or sooner, you are authorized and directed to deliver to Fairbanks, Morse & Company the said assignment of claim.

"We further understand and this arrangement is intended to insure that we shall be permitted to realize on this acceptance at any time on or after June 20, 1927, if we may desire." [43]

Plaintiff's Exhibit 7 is the assignment, reading:

PLAINTIFF'S EXHIBIT No. 7.

"For a valuable consideration, the receipt of which is hereby acknowledged, the LAKE UNION DRY DOCK & MACHINE WORKS does hereby assign, transfer and set-over unto FAIRBANKS, MORSE & COMPANY its claim against the Motorship 'ETHEL M. STERLING' and the STERLING STEAMSHIP COMPANY, as owner thereof, for repairs to the said motorship heretofore made by it upon the credit of said vessel as shown in detail upon the itemized statements hereto attached, on account of which there is now due and owing as of June 1, 1927, a balance of Eight Thousand One Hundred Thirty Dollars ($8,130.-00); and it does further assign and transfer unto the said FAIRBANKS, MORSE & COMPANY all rights of lien in admiralty or otherwise that it may have against said vessel and does authorize and empower the said FAIRBANKS, MORSE & COMPANY, as assignee hereunder, to take any and all steps as it may see fit for the enforcement

and protection of such rights and the collection of said claim, including the right to proceed, at its election, in the name of the Lake Union Dry Dock & Machine Works, but at the sole expense of it, the said FAIRBANKS, MORSE & COMPANY.

"IN WITNESS THEREOF, it has hereunto set its corporate seal and caused these presents to be duly executed by its authorized officers at Seattle, Washington, this 31st day of May, 1927.

"LAKE UNION DRY DOCK & MACHINE WORKS.

"By (Sgd.) J. L. McLEAN,
President.

(Seal) "Attest: (Sgd.) H. B. JONES,
"Secretary."

Plaintiff's Exhibit 8 is a telegram from A. W. Thompson, Los Angeles, Calif., to C. R. Miller, Fairbanks, Morse & Co., Seattle, dated June 1, 1927, reading:

PLAINTIFF'S EXHIBIT No. 8.

"Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment stop bear in mind that we are loath to increase our investment but must not under any circumstances jeopardize the sum now involved stop exhaust every effort to minimize our investment stop have you considered executing non interest bearing guarantee of

payment at four to six months as preference to immediate cash outlay." [44]

To which is attached wire of C. R. Miller to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, California, dated May 31, 1927, reading:

"Refer my letter twenty first regarding Sterling Steamship account of the eleven thousand dollars libel claims mentioned Lake Union Dry Dock Company have claim eighty one hundred thirty dollars which must be paid by June twentieth vessel now Galveston loading cargo for Honolulu and Lake Union people threaten to libel June second unless we agree to pay their bill on or before June twentieth Stop we stand to lose heavily if we permit libel proceedings and I suggest that we assume Lake Union bills taking proper assignment thus permitting vessel to proceed if this meets with your approval we will advise Lake Union people accordingly otherwise if you wish further information suggest telephoning me as they must have our answer Thursday morning."

Plaintiff's Exhibit 9 is a letter dated May 21, 1927, to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, Calif., from C. R. Miller, manager, reading:

PLAINTIFF'S EXHIBIT No. 9.

"Our balance sheet for the first four months was mailed to you yesterday. An analysis of this will show, according to our figures, that we have made a net profit of approximately $4300.00 for

the period. While this is on the right side of the ledger, it seems to me that with our present rate of sales it cannot continue, unless we reduce our expenses. It is sometimes, of course, unwise to deliberately tear down an organization on account of poor business conditions which might be of a temporary nature. At the same time I cannot help but feel that unless we take some rather definite and radical action we will make a bad showing, and I hope very soon to have the benefit of your good advices.

"You have received copies of my letters to both Mr. Hovey and Mr. Manley regarding the conditions here and remembering statement you made recently in Los Angeles that Mr. Hovey wishes to release $5,000,000.00 in the corporation, we are endeavoring to contribute our full share of this. By going over the latest financial report of the Company it seems that this reduction will amount to from 20 to 25% in both inventories and accounts. Our outstandings have been reduced some $70,000.00 during the past 30 days. Our inventory has been reduced about $25,000.00. We can, of course, make [45] further reductions in our inventory, as well as the accounts.

"As you will note from my letter to Mr. Hovey, the bankers here are asking their industrial customers to reduce their loans. This cannot help but have some effect upon collections. Mr. Kuppler has been able recently to devote a great deal of time to the matter of collections and is making considerable progress. There are a great number

of old accounts in the Portland territory that are in bad shape, and we will have to take some losses, but we are getting them straightened out as rapidly as possible.

"We are just now facing another embarrassment in our account with the Sterling Steamship Corporation on a contract covering two 240 H. P. engines, taken last year. The first payment of that contract, amounting to $4500.00, will fall due June 1st of this year, but they will not be able to meet it. As a matter of fact, the Sterling Steamship Corporation is in very serious financial trouble and I doubt if they will be able to survive. They owe us about $50,000.00, $31,000.00 of which is secured by a preferred first mortgage on the M/S 'Ethel M. Sterling'; $21,000.00 covers open account and is a direct lien against the vessel. The original cost of the 'Ethel M. Sterling' was $450,000.00 and the replacement cost given as $400,000.00. In addition to our claim there is about $11,000.00 against the boat, the most of which will have to be paid, I am informed, within the next 30 days. The vessel is now enroute to Galveston, Texas, under charter for a sulphur cargo from Galveston to Honolulu. This trip will return about $8,000.00 and we have succeeded in having the charter assigned to us. We will, therefore, receive this money, and with our libel clams, we should be able to have assigned to us any future charters.

"This is a very good and substantial boat and undoubtedly will be a money maker. On account

of their present financial difficulties, however, we will be delayed in getting our money. The plan is now as soon as the vessel arrives in Honolulu to obtain a cargo of freight from there either to San Francisco or Seattle. In this way the vessel will be located on the West Coast, where there should be no difficulty in securing enough business not only to pay off all of its indebtedness, but to make some money besides. The vessel is of steel construction and is covered by a $60,000.00 insurance policy, payable to us as our interest may appear.

"With further reference to Mr. Hovey's letter, can only say that this is of very much importance to us and any suggestions you may have to offer in our operations here will be very gladly received." [46]

Plaintiff's Exhibit 10 is a wire dated June 1, 1927, from A. W. Thompson, Los Angeles, Calif., to C. R. Miller, Fairbanks, Morse & Co., Seattle, reading:

PLAINTIFF'S EXHIBIT No. 10.

"Does not your preferred mortgage on vessel if over two hundred gross tons protect it against libel proceedings conformity Jones Bill answer immediately."

To which is attached wire dated June 1, 1927, from C. R. Miller to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., Los Angeles, reading:

"Lake Union Drydock claim represents unpaid

balance of their bill for repairs to vessel and engine foundations contracted prior to our mortgage and delivery of engines our attorneys advise their claim is prior to our mortgage"

Plaintiff's Exhibit 11 purports to be a telegram from Insurance Department at Chicago, Ill., to W. R. Kuppler, care Mgr., Fairbanks, Morse & Co., Seattle, dated June 15, 1927, reading:

PLAINTIFF'S EXHIBIT No. 11.

"Referring your letter Dierks we consider necessary protection our interest Ethel M. Sterling place with Johnson & Higgins twenty thousand additional free damage absolutely on hull in name Sterling Company loss payable quote Fairbanks Morse & Co or order unquote Stop not as interest may appear Stop also make loss present hull policy payable similarly Stop also necessary write new certificate describing engines and quote equipment as per contract of unquote giving date of contract and including Inchmaree collision and property and indemnity optional coverage cancelling old certificate as of this date." [47]

Plaintiff's Exhibit 12 purports to be a telegram from Fairbanks, Morse & Co., Seattle, Wash., to F. C. Dierks, Fairbanks, Morse & Co., at Chicago, Illinois, dated June 21, 1927, reading:

PLAINTIFF'S EXHIBIT No. 12.

"Sterling charter money held up account discrepancy in tonnage lifted at Galveston wired them

Saturday to forward check for eight thousand and fifty dollars immediately and adjust remainder soon as possible."

Plaintiff's Exhibit 13 purports to be a telegram from C. R. Miller, Seattle, Wash., dated June 22, 1927, to A. W. Thompson, Pacific Coast Manager, Fairbanks, Morse & Co., San Francisco, reading:

PLAINTIFF'S EXHIBIT No. 13.

"Ethel Sterling now at Colon and wiring for twenty five hundred dollars for fuel and canal tolls we havent the money here and if agreeable with you suggest San Francisco office advance immediately twenty five hundred dollars to W. R. Grace and Company San Francisco for account of Sterling Steamship Corporation answer quick." [48]

Defendant's Exhibit "A-1," by-laws of Fairbanks, Morse & Co., adopted March 26, A. D. 1924, together with amendments in effect on June 2, 1927, provides that the principal office of the corporation shall be in the city of Chicago, Illinois; that the business shall be managed and controlled by a Board of eleven (11) Directors; that the executive officers of the corporation shall be Chairman of the Board of Directors, a Vice-Chairman of the Board of Directors, a President, one or more Vice-Presidents, a General Manager, a Treasurer and a Secretary. Sections III and IV, of Article VI, provide:

DEFENDANT'S EXHIBIT No. "A-1."

"SECTION III. No note, acceptance or other obligation of the corporation for the payment of money (other than checks) shall be valid unless signed in the name of the corporation by the President, or in his absence or inability to sign, by a Vice-President, and countersigned in either event by the Treasurer, countersigned by the Secretary and in the event of the absence or inability of both the President and a Vice-President, then such note, acceptance or obligation may be signed in the name of the corporation by the Treasurer and countersigned by the Secretary, provided however, the Board of Directors may, by resolution, authorize any bank or banks of deposit of this corporation to accept as valid notes, acceptances or other obligations of the corporations for the payment of money (other than checks) if signed in the name of the corporation by the President or a Vice-President and countersigned by the Treasurer or Secretary, or if signed in the name of the corporation by the Treasurer and countersigned by the Secretary.

"SECTION IV. No officer, agent or employee of this corporation shall sign this corporation's name as guarantor or surety upon any bond, note, contract or other instrument of any person, firm or corporation, and any such guaranty or obligation, executed in the name of the corporation, shall be null and void, but nothing herein contained

shall preclude the proper officer from executing as herein provided, in the name of the corporation, as principal, any bond, note, contracts or other instrument, or, when authorized by a resolution of the Board of Directors of guaranteeing in the name of the corporation the payment of notes or other obligations of another corporation of which the entire capital stock is owned by this corporation." [49]

Defendant's Exhibit "A-2" is a letter from Fairbanks, Morse & Co., W. R. Kuppler, Credit Manager, to F. C. Dierks, Assistant Secretary, Fairbanks, Morse & Co., Chicago, Illinois, dated June 10, 1927, *re* Sterling Steamship Corp. Acct. Vessel "Ethel M. Sterling" formerly "Hawaii," reading:

DEFENDANT'S EXHIBIT "A-2."

"The Sterling Steamship Company owe on 7% notes secured by first preferred mortgage, $30,800.00 principal. On maritime 7% note dated February 1st, 1927, which was originally $24,942.62 a principal balance of $20,678.66 with interest at 7% from April 15th, 1927.

"We have advanced to the 'Ethel M. Sterling' for wages, fuel, provisions, etc., from May, 10th, 1927, to bring the vessel from the Dutch West Indies to Galveston, a total of $8,534.38 up to date. Vessel left Galveston, Texas, with a cargo of 1658.661 long tons of Sulphur bound thru the Panama Canal to Honolulu, Territory of Hawaii at 4:30 P. M., June 8, 1927.

"The charter price of $5.00 per ton is payable

to us by proper assignment and accepted and we expect to collect approximately $8300.00 covering the prepaid freight by June 16th, check will be payable directly to Fairbanks, Morse & Company, Seattle.

"It is our intention to apply $5000.00 of this payment upon the 7% demand note of February 1st, 1927, and the balance of the demand note remaining will then be 100% libel claim against the vessel in addition to our mortgage of $30,800.00 for the reason that this covers additional libel sales that were made by Fairbanks, Morse & Company last December and installed within the vessel 'Ethel M. Sterling.' The money that we have advanced during the past 30 days for wages, etc., is also a libel claim. As soon as we receive the prepaid freight check it is our intention to take it up with Messrs. Van Dyke & Thomas, our Seattle attorneys, to learn best how we shall apply this, but we believe it will be applied in accordance with above.

"The shipyard bill, Mr. Dierks, the engine, foundations, etc., amounted to approximately $25,000.00 and it was only recently that we were compelled to guarantee balance owing Lake Union Dry Dock & Machine Works for which they demanded payment on June 20th, 1927, in full. They have a libel claim ahead of Fairbanks, Morse & Company's mortgage and before we had delivered the engines in the hull and while they have been working 100% with us on this deal, they had certain obligations to meet and gave us advance notice that they were going to libel the ship at Galveston unless we would

guarantee to pay them by June 20th, 1927. After taking the matter up with A. W. Thompson, Pacific Coast Manager, and with the Lake Union Dry Dock & Machine Company, and their attorneys and our attorneys, we [50] got them to give us an additional three months extension beyond June 20th to make this payment, namely September 20th, 1927, whereby we might receive the benefit of any outbound freight cargo from Puget Sound, upon which the Sterling Steamship Company and their brokers are now working and it was agreed the simplest way to handle it was for Fairbanks, Morse & Company to give the Lake Union Dry Dock & Machine Company a trade acceptance for $8,000.00 which was done, drawing 6% interest, payable September 20th, 1927, and the Lake Union Dry Dock & Machine Works have assigned to us in legal form, approved by our attorneys, their entire libel claim. So in addition to this claim in connection with the original construction and first shipment out of Seattle, approximately $3200.00 is still payable not pressing among five creditors here and the actual cost of the vessel when completed shown by the books is $110,000.00, carried on the corporation books shows at $140,000.00. The vessel was built in Scotland in year 1920, of steel, original construction cost given as $450,000.00, replacement cost at $400,000.00, insurance valuation by the Board of Marine Underwriters at Seattle of $200,000.00. Insurance value of hull only as per insurance policy recently mailed to Mr. Stoddard, which we got them to reduce to $100,000.00, exclusive of the engines and

equipment. Vessel now has American Bureau class A rating, gross tonnage 1085 lumber carrying capacity about *$1*,100,000 feet.

"The trip from Galveston, Texas to Honolulu back to San Francisco or Seattle is approximately 10,000 miles and it is expected that the vessel will be at Puget Sound chartered outbound again prior to her arrival during early September. This account has given us much concern and has taken considerable time of the writer, who was treasurer of the company and one of five directors, resigning of his own volition on May 13, 1927, as treasurer and as a trustee and turned back to Captain Ray Sterling stock in the $100,000.00 corporation which was given to the undersigned to qualify as trustee and for the work put in on this deal over a period of more than one year. My reason for resigning being that if there was any stock liability in case the company got in financial difficulty there might be some question as to this liability and my own opinion being some two months ago that the company would not be able to survive and carry out their present charter agreement covering the other three vessels owned by the company, excluding the 'Ethel M. Sterling' in which all of our interest is represented.

"A copy of the April 30th, 1927, trial balance is enclosed and from what Captain Ray Sterling has told us during this week, it is his expectation to meet the vessel in Honolulu himself and take active charge as he or his associates have by no means given up the working out of the company diffi-

culties up to now, although I have differed with them.

"For your information would state that the Schwager-Karlen Lumber Company of Seattle had arranged with [51] Captain Sterling to carry some 30,000,000 feet of lumber from Puget Sound to Maracaibo, Venezuela, for two or more very large oil companies, which business they secured through their Philadelphia brokers. The lumber has to be unloaded at Curacao, Dutch West Indies and then redelivered from there to destination in light draft vessels not drawing over 12 feet of water over the bar into Maracaibo, Venezuela.

"For this purpose they had chartered, that is the Sterling Steamship Company, the 'Ruby' a boat thru Schwabacher Hardware Company of Seattle. The 'Ruby' got into trouble having mutiny aboard and being tied up in a foreign port the American Counsul would not permit them to proceed. The 'Ruby' left Puget Sound last October and it is still in Venezuela. In the meantime the Schwager-Karlen people purchased enough lumber locally to load the steamer 'Bert E. Haney' owned by the Sterling Steamship Corporation and one of the six masted ships, which took the Schwager-Karlen money, that is their bank credit.

"These vessels left Seattle about six weeks ago and we understand are due to arrive at Curacao, Dutch West Indies about to-day. The Schwager-Karlen Lumber Company had two charter agreements with the Sterling Steamship Corporation which ran approximately $100,000.00 covering the

prepaid freight, they withheld part of the freight amounting to approximately $17,000.00 against the Sterling Steamship Corporation who had failed to make complete delivery at final destination on account of the mutiny trouble on 'Ruby' on former lumber shipments.

"To make matters worse, the Dexter Horton National Bank, with which Schwager-Karlen Lumber Company were doing business, and which lumber company has a very high credit on the Pacific Coast as to the payment of their bills and which bank had loaned them some $200,000.00 or $300,000.00 refused to loan them any more money. The situation is quite complicated between the Sterling Steamship Corporation, the Schwager-Karlen Lumber Company and the Dexter Horton National Bank, due to the fact that the Schwager-Karlen Lumber Company did not pay the balance of the prepaid freight money as per charter agreements, a $12,000.00 loan made at the American Exchange Bank by the Sterling Steamship Corporation was not met at maturity and this has hurt considerably the credit of the Sterling Steamship Corporation.

"The steamer 'Bert E. Haney' 1500 HP and one of their six masted schooners carry approximately 4 million feet of lumber and these vessels are carried upon the Sterling Steamship Company books at $80,000.00 were by bill of sale conveyed to the Schwager-Karlen Lumber Company to guarantee them against any loss in connection with the de-

livery of this lumber to final destination. It seems that the 'Ethel M. Sterling' powered by our two 240 twin 'C–O' engines was also not able to profitably carry the lumber from Curacao to Maracaibo, a distance of approximately 200 miles on account of being too deep and not being able to go over [52] the bar with more than 100,000 feet. Hence it was necessary for the Schwager-Karlen Lumber Company to make other arrangements to satisfy the oil companies to get this lumber transshipped from Curacao, D. W. I. in Venezuela at a higher cost than had been contracted for between the 'Ruby' and the Sterling Steamship Company, namely, $6.00 per thousand.

"The 'Ruby' is really able to transship the lumber but on account of the crew and the captain not being able to work together Schwabacher Hardware Company of Seattle, advise us that their claim against the boat is something like $50,000.00 at the present time. This vessel is nothing but a wooden schooner with an 80 HP gasoline engine carrying capacity about 400,000 feet.

"After this trouble started, the 'Ethel M. Sterling' having already discharged her cargo at Curacao, D. W. I., we being anxious to get the vessel out of these waters, succeeded thru Robert D. Hill, a broker, to obtain a Sulphur cargo with responsible people from Galveston to Honolulu and we got the Sterling people to take it and assign the freight to us, ou*t* thought being to get the vessel away from foreign waters into a U. S. port as quickly as pos-

sible on account of the difficulties that had made their appearance upon the horizon.

"The first payment on the engines as per mortgage notes was due June 1st, 1927, and the balance as per contract and is due over a period of three years and it seems to us and always has that the thing to do is to keep the vessel engaged at profitable work if at all possible and this we feel can be done. As to the resale value of the 'Ethel M. Sterling' believe that the vessel might be sold at a value of $70,000.00 to $75,000.00 and if the Sterling Steamship Corporation lose the other three vessels we believe that Captain Sterling will devote his efforts and energy to one vessel, the 'Ethel M. Sterling' and that he will pay out.

"The writer while treasurer of the company signed all the checks and knows that no money was misappropriated and that the books are in A1 shape and inasmuch as he assisted the Sterling Steamship Corporation in securing good size loans at the American Exchange Bank after personally assisting the corporation by giving the bank his personal endorsement on two occasions and a $10,000.00 check to the Sterling Steamship Corporation at one time, felt that he had done his share and more than might be considered good with consistent business in helping the corporation when not one cent of compensation except 7% interest had been paid this year for all of this assistance and the writer concluded that if anything should happen to the corporation that he did not want to be implicated with a failing concern and thought he

could better protect Fairbanks, Morse & Company's account by resigning. Josiah Thomas, one of our local attorneys is still secretary of the company, taking that position when company was organized to help us. [53]

"This matter has been fully discussed Mr. Dierks between Mr. C. R. Miller, our Seattle manager and Mr. A. W. Thompson, Pacific Coast manager has been aware of the circumstances during the past few weeks so that you might know Mr. A. W. Thompson is fully acquainted with the facts in this case and we are sending a copy of this communication to him so that an up to date report is available for all concerned.

"Naturally when the boat goes thru the Panama Canal certain additional sums will be required, perhaps $1500.00 and when the vessel arrives at Honolulu, which we estimate will be about July 25th, other charges will have accrued and in order to get the vessel back to Puget Sound we will be obliged, from present indications to advance further sums and for which we will not be reimbursed until outbound charters are obtained, but a broker at San Francisco and at Seattle is now working on securing a charter from Honolulu to Frisco or Puget Sound, and as to securing an outbound charter for this boat from Seattle with lumber, we know this will not be a hard matter, freight prepaid.

"You may rest assured Mr. Dierks that the writer has been giving this account a great deal of attention daily and with the dark clouds that

seem to have gone by and those ahead feel optimistic enough to think that this vessel alone will pay out within a three year period. If Captain Sterling had not purchased the steamer 'Bert E. Haney' which cost approximately $50,000.00 to carry out his charter arrangements with the Schwager-Karlen Lumber Company and had devoted all his time and attention to this one vessel and perhaps one other ship, the company would not be in this financial difficulty by this overexpansion.

"Photo of vessel enclosed.

"Will be glad to send you further reports from time to time."

Defendant's Exhibit "A-4" is a letter dated July 7, 1927, from Cosgrove & Terhune, by Howard G. Cosgrove, to Lake Union Dry Dock & Machine Works and First National Bank, reading:

DEFENDANT'S EXHIBIT "A-4."

"Fairbanks, Morse & Co. has just learned of the execution of a document purporting to be a trade acceptance for $8,000.00, 'together with 6% interest thereon from March 1, 1927, amounting to $266.66,' dated June 2, 1927, drawn by Lake Union Dry Dock & Machine Works upon Fairbanks, Morse & Co., payable September 20, 1927. Said document has written on the face of it what purports to be an acceptance by 'Fairbanks, Morse & Co., by C. R. Miller, Agent.'

"Fairbanks, Morse & Co. has also just discovered that on or about said June 2, 1927, the Lake Union

Dry Dock & Machine Works executed and delivered to [54] the said C. R. Miller, a document purporting to assign to Fairbanks, Morse & Company an account of the Lake Union Dry Dock & Machine Works in the sum of $8,130.00, against the motorship 'Ethel M. Sterling' and the Sterling Steamship Company. Said document bears date May 31, 1927.

"It appears that said purported trade acceptance is now in the possession of the above mentioned First National Bank.

"Yesterday, Fairbanks, Morse & Co., acting by and through its Vice-President and Treasurer, Mr. S. T. Kiddoo, orally notified the said First National Bank that the said C. R. Miller had no authority to accept said trade acceptance in the name of Fairbanks, Morse & Co., and that the act of the said C. R. Miller in so endorsing said acceptance and in taking said assignment was repudiated by the said Fairbanks, Morse & Co.

"Under instructions for Fairbanks, Morse & Co., we hereby notify you and each of you: that Fairbanks, Morse & Co. disavows the act of the said C. R. Miller in executing said purported trade acceptance and in taking said purported assignment; that the said C. R. Miller had no authority to execute said document and take said assignment; and that the said Fairbanks, Morse & Co. refuses to be bound thereby in any particular.

"The said purported assignment is in our possession, and we are authorized to deliver the same to the party to whom it may belong.

"Please acknowledge receipt of this letter."

Both sides rested, and thereafter the defendant challenged the sufficiency of the evidence and moved for a dismissal. The Court denied the motion, to which an exception was taken.

Thereafter, the parties requested special findings and conclusions, and the Court, pursuant thereto, made and entered its findings and conclusions, after which judgment in favor of the plaintiff was entered.

And the defendant prays that this, its bill of exceptions, may be allowed, settled and signed.

COSGROVE & TERHUNE,
Attorneys for Defendant. [55]

The plaintiff accepts the foregoing proposed bill of exceptions without amendment, and stipulates that the same may be settled and allowed without notice.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

On this 15 day of October, 1928, in term, the foregoing exceptions are settled and allowed, and certified to contain the substance of all the evidence offered and/or introduced in said trial.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Oct. 15, 1928.

[Endorsed]: Copy of within bill of exceptions received and service of same is acknowledged this 5th day of Oct. 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff. [56]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL AND ORDER FIXING APPEAL AND SUPERSEDEAS BOND.

To the Honorable JEREMIAH NETERER, Judge of the Above-entitled Court:

Comes now the defendant above named, by its attorneys, and respectfully shows that on the 18th day of September, 1928, the above-entitled court entered a final judgment herein in favor of said plaintiff and against the said defendant.

Your petitioner, feeling itself aggrieved by the said judgment, has heretofore served and does herewith file this its notice of appeal from said decision and the rulings of the Court theretofore entered in the trial of said cause to the United States Circuit Court of Appeals for the Ninth Circuit, under the laws of the United States in such cases made and provided, and herewith petitions the court for an order allowing said appeal.

WHEREFORE, your petitioner prays that said appeal to said court be allowed, and that an order be made fixing the amount of security to be given by appellant conditioned as the law directs, and upon giving such bond as may be required, that all further proceedings may be suspended until the determination of said appeal by said Circuit Court of Appeals.

COSGROVE & TERHUNE,
Attorneys for Petitioner and Appellant. [57]

Appeal allowed this 29 day of October, 1928, and appeal and supersedeas bond fixed at $10,000.00.

Upon the making and filing of such bond, all further proceedings shall be suspended until the determination of said appeal by the said Circuit Court of Appeals.

JEREMIAH NETERER,
Judge.

Service of the foregoing notice of appeal, petition for allowance of appeal and order fixing appeal and supersedeas bond acknowledged this 29th day of October, 1928, and appeal and supersedeas bond in the sum of $10,000.00 is hereby approved.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 29, 1928. [58]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the defendant above named (appellant), and in connection with its appeal in this cause assigns the following errors, which it avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

(1) The Court erred in admitting Plaintiff's Exhibit 5. Said exhibit is in words and figures as follows, to wit:

"No. ——. Date June 2 1927

$8000.00

On Sept. 20, 1927, pay to the order of the undersigned Eight Thousand and No —— Dollars, together with six per cent interest thereon from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS.

By OTIS CUTTING, Treasurer.

H. B. JONES, Secretary.

To Fairbanks, Morse & Co.,
Seattle, Wash.

O. K.—KUPPLER.

Accepted: 6/2/1927.

Payable at ——.

(Specify Bank or Address.)

FAIRBANKS, MORSE & CO.

By C. R. MILLER, Agent."

At the opening of the trial plaintiff offered Plaintiff's Exhibit 1, to which defendant objected as follows: [59]

> "I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company."

It was admitted, with an exception allowed.

The witness Jones then testified concerning certain statements said to have been made by Kuppler, to which the defendant objected.

"on the ground that there is no showing that Mr. Kuppler had any authority of any kind whatever to make any statements."

Jones further testified, and Plaintiff's Exhibit 3 was offered and admitted,

"notwithstanding the defendant making the same objections heretofore made."

Upon Plaintiff's Exhibit 4 being admitted, defendant objected, saying:

"May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?"

to which the Court replied:

"Same objection may run to all. Proceed."

Plaintiff's Exhibits 5, 6 and 7 were offered together, and the Court announced concerning the same:

"The same ruling. Objection noted the same as before.

Mr. COSGROVE.—Yes, continue these same objections the same as before and exceptions to the Court's rulings.

The COURT.—Yes."

Of the above-mentioned objections, the following is particularly applicable to Plaintiff's Exhibit 5:

"I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company." [60]

(2) The Court erred in denying defendant's

challenge to the sufficiency of the evidence and its motion to dismiss the action.

WHEREFORE, defendant (appellant) prays that the judgment of said Court be reversed, etc.

COSGROVE & TERHUNE,
Attorneys for Defendant (Appellant).

[Endorsed]: Filed Oct. 29, 1928. [61]

[Title of Court and Cause.]

APPEAL AND SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS: That we, Fairbanks, Morse & Co., a corporation of the State of Illinois, as principal, and the Fidelity and Casualty Company of New York, a corporation of the State of New York, as surety, are held and firmly bound unto Lake Union Dry Dock & Machine Works, a corporation of the State of Washington, in the sum of Ten Thousand ($10,000.00) Dollars, to be paid to the said Lake Union Dry Dock & Machine Works, to which payment well and truly to be made we bind ourselves, our successors and assigns, by these presents.

Sealed with our seals and dated this 29th day of October, 1928.

WHEREAS, lately a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit pending in said court between the said Lake Union Dry Dock & Machine Works, as plaintiff, and the

said Fairbanks, Morse & Co., as defendant, final judgment was rendered against the said Fairbanks, Morse & Co. for the sum of $8,825.23, with interest thereon at the rate of 6% per annum from September 18, 1928, and the said defendant has served and filed (according to statute) in the Clerk's office of said court, a notice of appeal from said judgment [62] to the United States Circuit Court of Appeals for the Ninth Circuit, and has obtained a citation directed to the said Lake Union Dry Dock & Machine Works citing it to be and appear before the said United States Circuit Court of Appeals to be holden at San Francisco, in the State of California, according to law within thirty (30) days from the date hereof.

Now, the condition of the above obligation is such that if the said Fairbanks, Morse & Co. shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FAIRBANKS, MORSE & CO.,
By J. R. BENSON,
Its Attorney-in-fact.

THE FIDELITY AND CASUALTY COMPANY,
By ROBERT E. DWYER, (Seal)
Its Attorney.

O. K.—BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

The foregoing is approved as an appeal and supersedeas bond this 29 day of October, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Oct. 29, 1928. [63]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the United States District Court for the Western District of Washington, Northern Division:

You will please prepare and return in behalf of the defendant (appellant), according to the statutes and rules of said court, a transcript of the record herein, including:

1. Complaint.
2. Order of removal.
3. Docket entry showing filing with Clerk of District Court, complaint, petition for removal, bond, order of removal and notice to plaintiff of removal.
4. Answer.
5. Stipulation waiving jury.
6. Judgment.
7. ~~Minute entry of September 18, 1928, extending time for filing bill of exceptions.~~ (Stricken authority H. G. Cosgrove.)
8. Docket entry showing filing motion for new trial. (See Pg. 5.)

9. Minute entry showing motion for new trial denied.
10. Bill of exceptions.
11. Petition for allowance of appeal, order of allowance, and order fixing appeal and supersedeas bond.
12. Assignment of errors.
13. Bond on approval.
14. Citation.
15. Clerk's certificate.
16. This praecipe.

COSGROVE & TERHUNE,
Attorneys for Defendant (Appellant).

[Endorsed]: Filed Oct. 29, 1928. [64]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 65, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of rec-

ord and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [65]

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate or return, 198 folios at 15¢ $29.70

Certificate of Clerk to transcript of record, with seal .... .50

Total $30.20

I hereby certify that the above cost for preparing and certifying record, amounting to $30.20, has been paid to me by the attorneys for appellant.

I further certify that I attach hereto and transmit herewith the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 14th day of November, 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,

Deputy. [66]

[Title of Court and Cause.]

CITATION.

To Lake Union Dry Dock & Machine Works, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, State of California, thirty (30) days from and after the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States of America, for the Western District of Washington, Northern Division, from the judgment signed, filed and entered in the above-entitled cause on the 18th day of September, 1928, to show cause, if any there be, why the said judgment entered against the said defendant should not be corrected, and why justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of said District Court, this 29 day of October, 1928.

[Seal] JEREMIAH NETERER,

Judge.

Copy of within citation received and due service of same is acknowledged this 29th day of October, 1928.

BRONSON, JONES & BRONSON,

Attorneys for Plaintiff (Appellee).

[Endorsed]: Filed Oct. 29, 1928. [67]

[Endorsed]: No. 5634. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Co., a Corporation, Appellant, vs. Lake Union Dry Dock & Machine Works, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 22, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5634

United States

Circuit Court of Appeals

For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
JAN 10 1920
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5634

United States
Circuit Court of Appeals
For the Ninth Circuit.

FAIRBANKS, MORSE & CO., a Corporation,
Appellant,

vs.

LAKE UNION DRY DOCK & MACHINE WORKS, a Corporation,
Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. BRONSON, JONES & BRONSON, Attorneys for Appellee,
614 Colman Building, Seattle, Washington.

Messrs. COSGROVE & TERHUNE, Attorneys for Appellant,
2001 L. C. Smith Bldg., Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,940.

LAKE UNION DRYDOCK & MACHINE WORKS, a Corporation,

Plaintiff,

vs.

FAIRBANKS, MORSE & CO., a Corporation,

Defendant.

STIPULATION RE COURT'S OPINION.

IT IS HEREBY STIPULATED that the attached transcript of the opinion of the Court, rendered at the close of the evidence and argument herein, may be filed as of the date of the rendition thereof, to wit: September 6, 1928, and may be transmitted to the Circuit Court of Appeals as a part of the record on appeal herein.

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

Dated at Seattle, Washington, this 7th day of December, 1928.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.
COSGROVE & TERHUNE,
Attorneys for Defendant. [2]

COURT'S OPINION.

The COURT.—I have been considering this as the testimony has been going on and during the lunch hour I dictated one or two items to my stenographer. There is little dispute in the facts. From undisputed statements in court it may be concluded that the ship in issue was at the dock of the plaintiff undergoing repairs; engines sold by the defendant were being installed, some work was done upon the vessel at the request of the defendant by the plaintiff and other repairs at the request of the owners of the ship. The work done at the instance of the defendant was paid for. The defendant took a mortgage upon the ship for thirty thousand dollars or more, the statement in court fifty thousand, but there is no evidence as to that amount. The plaintiff's claim in issue was unpaid. The credit man of the defendant at Seattle was treasurer for the owners of the ship. The plaintiff was led to believe from the statements of the credit man of the defendant, the treasurer for the owners, that the defendant would take care of the claim of the plaintiff. This assurance on the part of the credit man of course was unauthorized by the de-

fendant. It was understood by all of the parties prior to and at the time of the execution of the trade acceptance in issue that the claim of the plaintiff was prior to the mortgage of the defendant. While the vessel was at Port Houston, the plaintiff requiring funds to meet an obligation, advised the credit man of the defendant of this need and the fact was developed that the plaintiff demanded that its claim be adjusted or the vessel would be libeled before it left Port Houston. The matter had not been presented concretely to Mr. Miller at least, the manager of the defendant at Seattle, prior to this time by the plaintiff. Miller, the manager, stated that he had no [3] authority to make an adjustment, that he would have to take the matter up with the officers of the company, and thereupon communicated with Thomas at Los Angeles and was authorized by Thomas to make the best adjustment that could be obtained, exercising his best judgment as to what to do, and thereupon or thereafter the trade acceptance was executed in harmony with the suggestion of the bank where this collateral or acceptance was to be negotiated and an assignment of the claim delivered to the defendant or Mr. Miller, its manager. Thereafter Mr. Kuppler, the credit manager, made his report to the main office in Chicago. Upon receipt of this report the defendant soon thereafter dispatched a representative or two to Seattle for the purpose, as said by Mr. Boughey while on the stand, to see about paying up the whole matter. Upon arriving at Seattle, however, or thereafter, on July 7th fol-

lowing, steps were taken to disavow the transaction. The vessel after sailing from Port Houston and arriving at the Port of Honolulu was attached by the defendant upon proceedings of foreclosure of mortgage and thereafter upon decree duly entered was sold and bid in by the defendant for the amount of its claim, I think it was stated in court fifty thousand dollars. At Seattle on July 7th through its attorneys the defendant wrote a letter to the plaintiff and to the bank taking this acceptance that it disavowed the transaction and denied the authority of Miller, its manager at Seattle, to execute the trade acceptance, and offered to deliver the acceptance to whoever was entitled to it. No tender, however, was made to anyone, but the assignment was held by the defendant until it was produced as an exhibit in evidence upon this trial.

I think the proofs establish the further fact that Thomas [4] had authority to execute or to direct the execution of the trade acceptance. There is testimony in the record that such is the fact and this is not denied by any of the evidence produced. I am convinced from all of the circumstances disclosed and the testimony presented that Mr. Miller is in error when he states that he told Mr. Jones that he had no authority to sign the acceptance at the time that it was delivered to him and also told him that he did not want the assignment and that Jones threw the assignment on the table and left it. And it must follow that Miss Anderson is in error

in her testimony when she said she heard Mr. Miller make the statement that he had no authority to sign the acceptance and that it was of no value. This testimony is absolutely contrary to the other evidence in the record, the conduct of Mr. Miller prior to that time in communicating with Mr. Thomas and the telegrams that had been received and what was done by the parties at the time; it is contrary to every reasonable conclusion to follow from the admitted undisputed facts appearing before the court. The statement as to lack of authority was made when Mr. Miller stated that he was powerless and would have to refer the matter to the officers of the company and then was given two days within which to do so and upon the conclusion of the communication and the advice of his attorneys he executed the trade acceptance. The statement of Mr. Miller that he told Mr. Jones he did not want the assignment and that Mr. Jones threw it on the table is not sustained by the evidence, not sustained by the record in the case, nor by the testimony of Miss Anderson, offered in corroboration, who said she heard the conversation and that all that was said was that he had no authority to sign the acceptance and that it was of no value as made. [5]

The evidence strongly preponderates and upon the evidence I feel convinced beyond a reasonable doubt that the execution of the trade acceptance by Miller was authorized by Thomas, who was empowered to give the authorization, and I think I might further state that the fact that the defend-

ant held a mortgage upon this vessel, knew of the plaintiff's claim and defendant's conduct after the receipt of Mr. Kuppler's letter, the delay in the disavowance or attempted disavowance of this contract until the entire change of relation between the parties, so strongly preponderates in favor of the plaintiff that the Court it would seem to me would be acting unconscionable to say that after the lapse of that time that the defendant should be permitted to disavow unless the status of the parties was restored. The manager at Seattle within the scope of the authority disclosed in the evidence in this case undoubtedly has power to incur incidental expenses in the collection of claims on sales made through the office for the defendant. This acceptance is an incident to the collection of a large claim. To have libeled the vessel and to have tied it up for only a day would have incurred an expense to the defendant equal perhaps, if not more than, the amount of the claim, and in addition would have been required to pay the claim of the plaintiff together with all of the incidental costs incurred in the collection, and while that is none of the Court's affair, it would seem that the local officer of the defendant ought to be complimented in exercising the judgment in forestalling the expense that would necessarily be incurred in permitting the vessel to be libeled under all of the circumstances if the claim of the plaintiff, as the testimony shows in this case, was considered by all parties to be prior to that of the defendant. I

think judgment for the plaintiff must be entered. There is nothing else that can be done.

[Endorsed]: Filed Dec. 11, 1928. [6]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause coming regularly on for trial on the 4th day of September, 1928, before the Court, a trial by jury having been waived in writing by the parties, the plaintiff appearing by its attorneys, Bronson, Jones & Bronson, and the defendant appearing by its attorneys, Cosgrove & Terhune, evidence having been submitted to the Court, the defendant having challenged the sufficiency of the evidence and having moved for dismissal, such challenge and motion having been denied and exceptions noted, the Court does now make the following findings of fact:

I.

That plaintiff is a corporation organized and existing under the laws of the State of Washington.

II.

That defendant is a corporation organized and existing under the laws of the State of Illinois, and during all the times hereinafter mentioned had its home office at the City of Chicago, Illinois.

III.

That the defendant, during all the times herein-

after mentioned, and since 1858, has been engaged in the manufacture and sale of engines, pumps, scales and similar equipment and machinery; that for many years prior to June 2, 1927, it has carried on its business in the State of Washington through its local manager, resident at Seattle. [7]

IV.

That on June 2d, 1927, the defendant acting through C. R. Miller, its local manager at Seattle, as agent, executed and delivered to the plaintiff its certain trade acceptance for the sum of Eight Thousand Dollars ($8,000.00) and Two Hundred Sixty-six and 66/100 ($266.66) interest, payable September 20, 1927, which is in evidence as Plaintiff's Exhibit 5 herein; that in consideration of the execution and delivery of said trade acceptance, the plaintiff assigned and delivered to the defendant its claim against a certain vessel, to wit: the M. S. "Ethel M. Sterling," which assignment is in evidence herein as Plaintiff's Exhibit 7, and released and relinquished certain insurance previously placed by the defendant upon the said vessel for the protection of the plaintiff, as set forth in Plaintiff's Exhibit 3 herein, and also forebore and refrained from the exercise of its right of libeling said vessel, then in the port of Galveston, Texas, and about to sail therefrom on June 4, 1927, to secure the payment of its claim; that at all of such times the defendant had, or claimed to have a mortgage upon said vessel, the "Ethel M. Sterling," for the sum of Thirty Thousand Eight Hundred Dollars ($30,800.00), and that the claim of the plain-

tiff was conceded and expressly recognized by the defendant as being superior to and entitled to prior payment as against its said mortgage; that the defendant also held an assignment of the freights of said vessel, the "Ethel M. Sterling," and was vitally interested in having said vessel proceed upon her voyage on June 4, 1927, and in havng the plaintff refrain from asserting its claim against said vessel. [8]

V.

That the said C. R. Miller, in executing said trade acceptance, was acting solely in the interest of the defendant, and in the protection of the defendant's interest in said M. S. "Ethel M. Sterling," on account of said mortgage and other bills and advances, aggregating approximately Fifty Thousand Dollars ($50,000.00), all of which were incurred through the defendant's local branch at Seattle under the charge of said C. R. Miller; and the collection of the freight moneys; that the authority of said C. R. Miller as local manager extended to the general handling of the business of the defendant in the State of Washington, Oregon, Idaho and a portion of Montana and Alaska, without any limitations or restrictions whatsoever made known to the general public; that the said C. R. Miller customarily reported to and acted under the general direction of A. W. Thompson, the Pacific Coast manager of the defendant, residing at San Francisco, or Los Angeles, and having general authority over all matters of defendant's branches on the Pacific Coast, at least up to sums not exceeding

$10,000, and who was authorized to act for the defendant in this transaction; that said Miller was expressly authorized and directed by the said Thompson, as Pacific Coast manager of the defendant, to act according to his discretion in the matter of the purchase of said claim, which authority is evidenced by an exchange of telegrams, being Plaintiff's Exhibit 8 herein.

VI.

That the defendant retained and profited by the consideration received by it from the plaintiff for the execution and delivery of said trade acceptance, to wit, the assignment of said claim, the release of the said insurance and the forbearance of the plaintiff to exercise [9] its right of lien against the said vessel "Ethel M. Sterling," none of which considerations were ever returned by the defendant to the plaintiff, and that the defendant has never offered to place, and it would have been impossible for it to place the plaintiff *in statu quo.*

VII.

That the defendant was fully advised of the giving of said trade acceptance on or before the 15th day of June, 1927, but that it did not notify the plaintiff of any disavowal or attempted repudiation thereof, until on or about July 8, 1927, and that such delay was unreasonable and prejudicial to the interests of the plaintiff and amounted to a ratification of such transaction by the defendant.

VIII.

That said trade acceptance was not paid when

due, nor has any part of the same been paid, and that the plaintiff is now the owner and holder thereof and entitled to receive payment thereon.

Done in open court this 18 day of September, 1928.

JEREMIAH NETERER,
Judge.

And as Conclusions of Law:

Finds that the plaintiff is entitled to judgment against the defendant for the amount of $8,266.66, together with interest upon the said sum from the 20th day of September, 1927, at the rate of Six per cent per annum.

Dated this 18 day of September, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Sep. 8, 928. [10]

[Title of Court and Cause.]

ORDER RESPECTING TRANSMISSION OF EXHIBITS.

Upon stipulation and request of counsel for both parties hereto, the Clerk of this court is hereby directed to transmit to the Circuit Court of Appeals, as a part of the record on appeal herein, the originals of all exhibits offered upon the trial hereof.

Done in open court this 17th day of December, 1928.

EDWARD E. CUSHMAN,
Judge.

O. K.—BRONSON JONES & BRONSON,
Attorneys for Plaintiff.

COSGROVE & TERHUNE,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 17, 1928. [11]

[Title of Court and Cause.]

PRAECIPE FOR SUPPLEMENTAL TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare supplemental transcript on appeal consisting of the following:

(1) Findings of fact and conclusions of law.

(2) Court's opinion.

(3) The originals of all exhibits offered upon the trial of this action.

BRONSON, JONES & BRONSON,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 11, 1928. [12]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO SUPPLEMENTAL TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 12, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by supplemental praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the supplemental record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellee for making supplemental record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [13]

Clerk's Fees (Act Feb. 11, 1925), for making record, certificate or return, 28 folios at 15¢ $4.20

Certificate of Clerk to Transcript of Record, with seal .... .50

Certificate of Clerk to Original Exhibits, with seal .... .50

Total $5.20

I hereby certify that the above cost for preparing and certifying supplemental record, amounting to $5.20, has been paid to me by the attorneys for appellee.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 19th day of December, 1928.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,

Deputy. [14]

[Endorsed]: No. 5634. United States Circuit Court of Appeals for the Ninth Circuit. Fairbanks, Morse & Co., a Corporation, Appellant, vs. Lake Union Dry Dock & Machine Works, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the United States Dis-

trict Court for the Western District of Washington, Northern Division.

Filed December 22, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5634

United States Circuit Court of Appeals

For The Ninth Circuit

FAIRBANKS, MORSE & CO., a corporation,
Appellant,

—VS.—

LAKE UNION DRY DOCK & MACHINE WORKS, a corporation,
Appellee.

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

COSGROVE & TERHUNE,
Proctors for Appellant.

2002 L. C. Smith Building,
Seattle, Washington.

THE ARGUS, SEATTLE

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

The appellee, Lake Union Dry Dock & Machine Works, a Washington corporation (hereinafter called the plaintiff), sued the appellant, Fairbanks, Morse & Co., an Illinois corporation (hereinafter called the defendant), upon an alleged trade acceptance (Paragraph III. of its complaint), reading as follows:

"Date June 2, 1927.

"No...................... $8,000.00

266.66

$8,266.66

On Sept. 20, 1927, pay to the order of the undersigned EIGHT THOUSAND AND NO/100, together with six per cent interest from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS,
By OTIS CUTTING, *Treasurer.*
H. B. JONES, *Secretary.*

To Fairbanks, Morse & Company,
Seattle, Washington.

Accepted June 2, 1927.

Payable at First National Bank of Seattle.

FAIRBANKS, MORSE & COMPANY,
By C. R. MILLER, *Agent.*"

Defendant's answer (Paragraph I. thereof) made denial as follows:

"Answering Paragraph III. of said complaint, said defendant denies each and every allegation therein contained; and alleges that if any such document was executed, that the said C. R. Miller, named in said purported document as agent of defendant, had no authority or right to make, execute and deliver or to accept said document, for or on behalf of the defendant, Fairbanks, Morse & Co. Defendant further alleges that if said document was so executed by the said C. R. Miller, it was without the knowledge or consent of the defendant."

Thus, in legal effect, the plaintiff alleges and the defendant denies that Miller had *actual* authority to

make, execute and deliver the said document in the name of the *defendant.*

It is generally held, and by the Washington statutes particularly provided, that the burden of proof upon such an issue was at all times upon the plaintiff.

Burden Upon Plaintiff

Acceptance

> "The burden of proving the acceptance of a bill or order where denied is on plaintiff."
>
> 8 C. J. 997.

Execution by Agent

> "Where commercial paper has been executed by an agent it is, as a general rule, incumbent on the holder to prove the agent's authority in order to render the principal liable, and the burden of making such proof is on the holder, although in some jurisdictions the authority of the agent need not be proved unless expressly denied in the answer."

The State of Washington, as the court will judicially know, has long since adopted the Uniform Negotiable Instrument Act. We quote two sections thereof as found in Remington's Compiled Statutes of the State of Washington:

Sec. 3409—Negotiable Instruments — Liability — Signature Necessary.

> "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable

to the same extent as if he had signed his own name."

Sec. 3410—Signature by Agent.

"The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

THIRD PERSONS MUST AT THEIR OWN RISK ASCERTAIN FACT AND EXTENT OF AGENCY

"It is, of course, a general rule that third parties dealing with an agent cannot rely upon the agent's assumption of authority, but must at their own risk, ascertain both the fact of agency and the extent of the agent's authority. The burden is upon them to show that the acts of the agent were within the scope of his authority * * * What comes within the apparent scope of an agent's authority, whether the agency be general or special, is determined by what is usual or necessary to the performance of the principal power; that is, what is necessary to effect the purposes of the agency."

O'Daniel v. Streeby, 77 Wash. 414.

Plaintiff did not plead an implied authority in Miller to execute the document; it did not plead that he signed the same within the apparent scope of his authority; and the complaint contains no allegations of estoppel or ratification. But if there were such allegations, the burden of proof would still be upon it.

The trial was had to the court without a jury, a written waiver thereof having been theretofore filed. At the close of the case a challenge to the sufficiency of the evidence and a motion to dismiss was denied (Trans. p. 81). Later, formal judgment was entered in favor of the plaintiff and against the defendant (Trans. p. 11). A motion for new trial (Trans. p. 7) was denied October 15, 1928 (Trans. p. 12). On the last mentioned date, defendant's bill of exceptions was certified (Trans. p. 86). From such judgment and trial rulings the defendant has appealed (Trans. p. 82).

ASSIGNMENTS OF ERROR (Trans. p. 83)

(1) The Court erred in admitting Plaintiff's Exhibit 5. Said exhibit is in words and figures as follows, to-wit:

"No. .... Date June 2, 1927.

$8,000.00

On Sept. 20, 1927, pay to the order of the undersigned Eight Thousand and No..................Dollars, together with six per cent interest thereon from March 1, 1927, amounting to $266.66.

Value received and charge the same to the account of

LAKE UNION DRY DOCK & MACHINE WORKS,

By OTIS CUTTING, *Treasurer.*

H. B. JONES, *Secretary.*

To Fairbanks, Morse & Co.,
Seattle, Wash.
O. K.—KUPPLER.
Accepted: 6/2/1927
Payable at..............................
(Specify Bank or Address)

FAIRBANKS, MORSE & CO.,
By C. R. MILLER, Agent."

At the opening of the trial plaintiff offered Plaintiff's Exhibit 1, to which defendant objected as follows:

> "I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company."

It was admitted, with an exception allowed.

The witness Jones then testified concerning certain statements said to have been made by Kuppler, to which the defendant objected,

> "on the ground that there is no showing that Mr. Kuppler had any authority of any kind whatever to make any statements."

Jones further testified, and Plaintiff's Exhibit 3 was offered and admitted,

> "notwithstanding the defendant making the same objections heretofore made."

Upon Plaintiff's Exhibit 4 being admitted, defendant objected, saying:

> "May we, without bothering the Court, counsel and witness, have these objections run to all of these documents?"

to which the Court replied:

> "Same objection may run to all. Proceed."

Plaintiff's Exhibits 5, 6 and 7 were offered together, and the Court announced concerning the same:

> "The same ruling. Objection noted the same as before.
>
> MR. COSGROVE: Yes, continue these same objections the same as before and exceptions to the Court's rulings.
>
> THE COURT: Yes."

Of the above mentioned objections, the following is particularly applicable to Plaintiff's Exhibit 5:

> "I object to it as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company."

(2) The Court erred in denying defendant's challenge to the sufficiency of the evidence and its motion to dismiss the action.

ARGUMENT

ASSIGNMENT OF ERROR No. 2 (Trans. p. 85)

> "The Court erred in denying defendant's challenge to the sufficiency of the evidence and its motion to dismiss the action."

There was no substantial evidence, or any evidence, that Miller had defendant's *actual* authority to accept and deliver said trade acceptance in its name.

Even if the issue had been one of execution and delivery with implied authority, or execution within the apparent scope of authority, the challenge and motion would have been well taken, for there was no substantial evidence, or any evidence, showing that Miller so executed and delivered said document.

It does not seem necessary for us to pick the evidence to pieces in order to show the absence of the specified and required evidence. Nevertheless, we do hereby search the record for the missing evidence.

The defendant, beginning business in Chicago, in 1858, is a corporation of the State of Illinois, with its principal place of business at Chicago. It is engaged in the manufacture of Deisel engines, scales, steam pumps, electrical equipment, selling and distributing the same through local sales offices, twenty-six or thereabouts, and five or six abroad (Trans. p. 37). Mr. A. W. Boughey from the defendant's home office, one of its directors, secretary and treasurer for twenty-five years, describing the business of the company, said that at Seattle it was done through its local sales manager, C. R. Miller, who was in charge of the local sales office.

> "He sold the goods for us and looked after the installation of the goods, looked after the servicing of the goods and collected the proceeds and paid the proceeds into a treasurer's account in a local bank here that we in Chicago drew against and he could not draw against; that ended the transaction. When he wanted any money he wrote

a letter to Chicago every week, specifying how much he might require for the next week, and we opened a local account in his name under which he paid those remittances and against which he drew checks for expenses for freight, that is, including his salesmen's wages and his office help; all that money was obtained from Chicago upon his written requisition."

Upon inquiry by the Court:

"When goods were sold and not paid for in cash, who arranged for the security or payment?"

the witness replied:

"If the local manager did not collect in cash he got a note and those notes would be sent to Chicago for endorsement or for discount by them. He had absolutely no right to discount notes here or sign endorsements, and never did.

"Not to my knowledge did the company purchase any claims against other people through the local office." (Trans. p. 38, 39)

He had previously testified that he knew the authority of the Seattle manager during the year preceding June 2, 1927, which was predicated upon his association as director and secretary of the defendant for nearly twenty-five years (Trans. p. 37). He identified, and there was admitted in evidence, the bylaws of the company in effect June 2, 1927, marked Defendant's Exhibit "A-1" (Trans. p. 38).

The plaintiff was a corporation of the State of Washington, with its principal place of business at Seattle, and Jones, McLean and Cutting were, re-

spectively, its secretary and attorney, president and principal owner, and vice-president and general manager. The Sterling Steamship Corporation owned the vessel "Ethel M. Sterling." Its president and treasurer were, respectively Ray M. Sterling and W. R. Kuppler. Kuppler appears to have been also the local credit manager of the defendant. His relationship to the Sterling Steamship Corporation, particularly his stock ownership therein, was not known to the defendant (Trans. p. 43).

Plaitiff's witnesses were Jones, Kuppler, McLean, Cutting and two telegraph company superintendents. In our analysis of the evidence made in our search for evidence of Miller's authority, we divide the whole into parts, as follows:

KUPPLER'S TESTIMONY AND ASSURANCES

The Court in its oral opinion referred to Kuppler's testimony as follows:

> "The plaintiff was lead to believe from the statements of the credit man of the defendant, the treasurer for the owners, that the defendant would take care of the claim of the plaintiff. This assurance on the part of the credit man of course was unauthorized by the defendant." (Supplemental Trans. p. 2)

TRANSACTIONS OF MAY 31, 1927

Jones, secretary and attorney of the plaintiff, said:

> "I had a claim to collect of eight thousand dollars balance due for repair work performed by

plaintiff on the 'Ethel M. Sterling,' formerly the 'Hawaii' (Trans. p. 13) * * * Our interests in relation to the vessel was the unpaid repair bill which was an obligation of the Sterling Steamship Company. The vessel sailed from the dock about the 1st of January, 1927. At that time all of the work on the vessel, to which I have made reference, had been completed, nothing thereafter being done upon her and entering into this matter whatsoever. * * We made no effort to libel the vessel for this unpaid bill before she left Seattle. * * * After the vessel left Galveston, she went to the Hawaiian Islands * * *." (Trans. p. 22)

Kuppler, plaintiff's witness, said:

> "There was not then pending any going business relations between the defendant and the plaintiff." (Trans. p. 29)

Jones, seeking to collect plaintiff's claim against the Sterling Steamship Corporation, knowing that defendant had a mortgage on the vessel, and that she was then in the port of Galveston loading for Hawaii, called upon Kuppler, Jones saying:

> "I caused an inquiry to be made and ascertained that the ship was due to leave Galveston on the 4th of June. McLean and I then called on Kuppler about the last of May. I then told Kuppler we had firmly made up our minds we would not let the ship leave Galveston without libeling her for our bill. * * *" (Trans. p. 16)

Kuppler took his visitors to Mr. Miller, to whom Jones said:

> "I told Miller we would not let the ship leave

Galveston without libeling her for our bill * * * I told him that we were going to insist on the payment of the bill or guarantee of the bill. He then said he would like to have a day or two to refer the matter to his people, and I told him that we would give him time, I think it was about two days. It is my recollection that I asked Mr. Miller at that time if it was necessary for him to do that and he said that it was not absolutely necessary, but he would like to do it." (Trans. p. 17)

He further told of Miller's indignation and surprise.

"Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. * * *" (Trans. p. 17)

Jones told Kuppler

"The plaintiff had an obligation of ten thousand dollars to meet on June 20th, and that it was very essential that it have these funds in hand on or before that time." (Trans. p. 14)

McLean's idea of the situation is found in his statement:

"We were not satisfied at the delay attached to these payments (referring to the delay of the Sterling Steamship Corporation) and insisted that defendant, being a large national outfit and having such a large claim against the vessel, could well afford to take care of our little claim and be in full control of the boat." (Trans. p. 32)

So far we see no evidence of Miller having any authority to accept the trade acceptance.

Miller-Thompson Relationship

Thompson was described by Kuppler as the Pacific Coast Manager of the defendant, with offices at Los Angeles. He was asked by plaintiff's counsel:

> "So that Mr. Miller here reported to Mr. Thompson?
>
> A: Yes, sir." (Trans. p. 25)
>
> "What was the limitation if you know, of the local manager in the execution of sales contracts?
>
> A: Why, he would approve contracts up to five thousand dollars—and copies of those contracts would go to the home office, as well as to the Pacific Coast Manager's office at Los Angeles at that time. Beyond that between five and ten, they must have the approval of the Pacific Coast Manager, at Pacific Coast Manager's headquarters, and in excess of ten thousand they had to go to Chicago as well as to the Pacific Coast Mananger, but the contracts, regardless of amounts, are always approved by the local manager after they O. K.'d or initialed by the other higher executives if they succeed, regardless of the amount." (Trans. p. 31)

It must be observed that the question and answer related to *sales* contracts, and did not relate to purchases, expenditures, investments or the execution of negotiable instruments.

Miller described the business at the local office and his connection with it, particularly saying that the business was that of selling merchandise—his duties were to see that the goods were sold, and installed, if sold that way, and the necessary service given to

them; also to see to it that the accounts were collected and the records kept.

> "Q: To whom did you report, if to anyone—to whom did you make reports of your business?
>
> A.: Well, I reported to Mr. Thompson, Mr. A. W. Thompson, the Pacific Coast Manager, at that time located at Los Angeles.
>
> "We sent our statement of accounts to the home office. To pay our expenses it was necessary for me to obtain our money from the Chicago office, and that was done in the form of a requisition. They would send me a check and I would deposit it in an account in the First National Bank. I did not have to go through Mr. Thompson for that. This account was in the bank carried under my name as agent. The moneys received from collections were deposited in the same bank in the name of the defendant, what we called a corporation account, over which I had no control whatever. It was a home office account." (Trans. pp. 44, 45)

We have hereinbefore repeated Mr. Boughey's description of Miller's duties and authority.

From the foregoing, we find Miller wholly controlled as to his expenditures and use of money by the Chicago office. True, to Thompson at Los Angeles, he made reports of his business, but that admission does not suggest any authority in either Thompson or Miller to accept a trade acceptance in behalf of the defendant.

TELEGRAMS BETWEEN MILLER AND THOMPSON

Apparently after the Jones call on Kuppler and Miller on May 31st, Miller wired to Thompson, defendant's Pacific Coast Manager at Los Angeles:

> "Refer my letter twenty-first regarding Sterling Steamship account of the eleven thousand dollars libel claims mentioned Lake Union Dry Dock Company have claim eighty-one hundred thirty dollars which must be paid by June twentieth vessel now Galveston loading cargo for Honolulu and Lake Union people threaten to libel June second unless we agree to pay their bill on or before June twentieth stop we stand to lose heavily if we permit libel proceedings and I suggest that we assume Lake Union bills, taking proper assignment, thus permitting vessel to proceed if this meets with your approval we will advise Lake Union people accordingly otherwise if you wish further information suggest telephoning me as they must have our answer Thursday morning." (Trans. p. 63)

Thompson appears to have answered by wire (Plaintiff's Exhibit 10, Trans. p. 66), as follows:

> "Does not your preferred mortgage on vessel if over two hundred gross tons protect it against libel proceedings conformity Jones Bill answer immediately."

to which Miller appears to have replied:

> "Lake Union Drydock claim represents unpaid balance of their bill for repairs to vessel and engine foundations contracted prior to our mortgage and delivery of engines our attorneys advise

their claim is prior to our mortgage." (Trans. pp. 66, 67)

Plaintiff's Exhibit 8 appears to be the reply of Thompson, dated June 1, 1927, reading:

> "Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment stop bear in mind that we are loath to increase our investment, but must not under any circumstances jeopardize the sum now involved stop exhaust every effort to minimize our investment stop have you considered executing non-interest bearing guarantee of payment at four to six months as preference to immediate cash outlay." (Trans. p. 62)

The Court, in its oral decision, said that Miller, the manager, said to Jones that he (Miller)

> "had no authority to make an adjustment, that he would have to take the matter up with the officers of the company, and thereupon communicated with Thomas at Los Angeles and was authorized by Thomas to make the best adjustment that could be obtained, exercising his best judgment as to what to do, * * * I feel convinced beyond a reasonable doubt that the execution of the trade acceptance by Miller was authorized by Thomas, who was empowered to give the authorization, * * *" (Supplemental Trans. p. 345)

There is not a single word of evidence anywhere in the record showing that Thompson had any authority to make, execute and deliver in the name of the

defendant any trade acceptance, or to delegate that power to Miller or anyone else. When the lower court stated that Miller was authorized by Thompson to make the best adjustment that could be obtained, it probably had in mind the telegram of June 1 (Plaintiff's Exhibit No. 8, Trans. p. 62), which began as follows:

> "Referring to Sterling Steamship Corporation with your knowledge of existing conditions and contact with competent legal advice matter must be left to your good judgment * * *"

But that is not all there was to the telegram. Thompson, after writing the foregoing, apparently thought it best to qualify himself and said:

> "bear in mind that we are loath to increase our investment, but must not under any circumstances jeopardize the sum now involved * * *"

After writing this, he added another qualification:

> "exhaust every effort to minimize our investment,"

and finally, having doubt about all of these suggestions which he had made, asked:

> "have you considered executing non-interest bearing guarantee of payment at four to six months as preference to immediate cash outlay."

Now, just what authority did Thompson pass to Miller? Was it to use his judgment, invest no more money, reduce the investment, or was he to consider a non-interest bearing guarantee? Obviously, Miller received no authority to do any particular thing. There was nothing in the exchange of telegrams between Miller and Thompson suggesting the purchase

of a claim against the Sterling Steamship Corporation and the execution of a trade acceptance. Thompson's suggested guarantee is not a suggestion of a direct promise to pay.

At this point, it is well to note that the evidence does not show this telegram ever having been shown to anyone representing the plaintiff. Jones did not ask Miller to wire for authority; he did not ask if he had authority; he said Miller told him he did not have authority. Even that did not seem to disturb him, for he said:

> "I told him that we would give him time, I think it was about two days." (Trans. p. 17)

If the plaintiff is relying upon the Thompson telegrams as the foundation of Miller's authority, it should prove:

(a) that the telegram purports to delegate the claimed authority.

(b) that Thompson had authority to delegate to Miller the claimed authority.

The telegram at best is ambiguous and full of doubt. No one can say that it purports to grant to Miller any authority whatever. If it did, there is no evidence to show that Thompson had any authority to delegate. On the contrary the evidence of Mr. Boughey shows that the defendant, through its by-laws had taken great pains to prevent the execution of negotiaable instruments by anyone except its highest officials. Thompson and Miller were not among such. They were sales agents; not officials.

Negotiable Paper—Authority to Execute

> "Commercial paper, such as bills, notes and checks, passes current to a limited extent like money, and accordingly power to an agent to execute or endorse it is to be strictly limited, and will never be lightly inferred, but ordinarily must be conferred expressly. The most comprehensive grant, in general terms, of power to an agent conveys no power to subject the principal to liability upon such paper unless the exercise of such power is so necessary to the accomplishment of the agency that such intent of the principal must be presumed in order to make the power effectual. Thus such power is ordinarily not to be inferred from authority to adjust all of the principal's accounts and concerns as he could do in person, or to exchange, buy, sell, collect, or loan for the principal, or to collect debts and execute deeds, *or from a general authority to manage a business*, unless such authority is necessarily implied from the peculiar circumstances of the particular case and is indispensable to the proper execution of the authority granted."
>
> 2 C. J. 636;

In the case of *Coleman v. Seattle National Bank*, 109 Wash. 80, we find that an alleged agent had from the principal a letter signed by the principal, reading as follows:

> "This is to certify that the bearer, Mr. R. S. Towse, is an authorized representative of the Spalding Fruit Company, and is hereby authorized to transact any and all business for said company."

The Court said:

"Looking to the seeming broad and comprehensive character of this writing as an agency appointment without thought of that particular branch of the law of agency touching the execution and issuance, and the transfer by endorsement—and thereby is in effect, the issuance—of negotiable paper by an agent for his principal, the writing might seem to confer upon Towse authority to endorse and transfer the check to the publishing company; but we think a consideration of this branch of the law of agency will readily render a claim that the language of this agency writing, as general and seemingly broad as it is, did not confer upon Towse the authority to so endorse and transfer the check. It takes something more than such general language to create such an agency. This because of the peculiar nature of negotiable paper and the rights and liabilities arising from its issuance. In one Mechem, agency (2nd Ed.), at Sec. 969, that learned author says:

" 'The power to bind the principal by the making, accepting or endorsing of negotiable paper is an important one, not lightly to be inferred. The negotiable instrument, in our law, is a contract which stands upon an independent footing. It is designed by its nature to circulate freely in the business world, and may come to persons and places far remote from those of its creation. It may confer upon a subsequent holder rights to which his defenses are unavailing. The author-

ity to create such obligations is obviously a delicate one, easily susceptible of abuse, and, if abused, bringing disaster and financial ruin to the principal. Our law, therefore, properly regards such an authority as extraordinary, and not ordinarily to be included within the terms of general grants; and the rule is absolutely established that it can exist only when it has been directly conferred or is warranted by necessary implication.' "

The Court then quoted approvingly the text of 2 C. J. 636, *supra.*

AUTHORITY TO SELL—NO AUTHORITY TO BUY

"Authority to sell of itself furnishes no authority to buy."

2 C. J. 588.

AN AGENT TO SELL—IMPLIED POWERS

"An agent to sell has no implied powers beyond those which are usual and necessary to the accomplishment of the sale, nor can he bind his principal beyond the limitations of his authority, of which the purchaser has actual or constructive notice. Thus, a mere power to sell, personally does not confer on the agent authority to purchase; or to borrow money."

2 C. J. 595.

AUTHORITY TO OPERATE RANCH—NO AUTHORITY TO BORROW OR EXECUTE PAPER

"Authority of agent to operate ranch did not

include authority to borrow money and execute negotiable promissory notes for the owner."

Security State Bank v. Adkins, 134 Wash. 94.

EXTENT OF AUTHORITY IN GENERAL

"Not only does the burden of proof as to the fact of agency rest with one who seeks to charge another as principal with the acts of an alleged agent, but the burden also rests with him to prove the extent of the agency; in other words, the burden is upon him to show that the act or acts of the alleged agent were within the scope of his authority. * * *"

2 C. J. 925.

TO MAKE CONTRACTS OF GUARANTY AND SURETYSHIP

"The power to make a contract of guaranty may be expressly given, * * * but such authority ordinarily is not to be implied from a general agency of any kind, such as the power to buy or sell, unless it is a usual or necessary incident to the particular power granted, or unless it may be implied from the conduct of the parties."

2 C. J. 665.

IMPLIED AUTHORITY

"Implied authority is that authority which the principal intends his agent to possess, and which is proper, usual and necessary to the exercise of the authority actually granted, or which is implied from the conduct of the principal, as from his previous course of dealing, or from his con-

duct under circumstances working against him an equitable estoppel."

2 C. J. 576.

DUTY OF THIRD PERSON

"A person dealing with an agent must not act negligent, but must use reasonable diligence to ascertain whether the agent acts within the scope of his powers."

Bowles Co. v. Clarke, 59 Wash. 336.

DUTY OF THIRD PERSON TO ASCERTAIN AUTHORITY

"It appears from the above rules that as a general rule every person who undertakes to deal with an alleged agent is, by the mere fact of the agency, put upon his inquiry, and must discover at his peril that it is in its nature and extent sufficient to permit the agent to do the proposed act, and that this source can be traced to the will of the alleged principal, particularly where he is dealing with an agent whose authority he knows to be special, or where it is the first transaction with the agent, or the circumstances connected with the agency are such as to put him on inquiry."

2 C. J. 562.

KNOWLEDGE IN GOOD FAITH OF THIRD PERSON

"It is also necessary to the application of the above general rule that the person dealing with the agent was aware of the principal's acts from which the apparent authority is deduced, and that he dealt with the agent in reliance thereon,

in good faith, and in the exercise of reasonable prudence."

2 C. J. 575.

TRANSACTIONS OF JUNE 2, 1927

Jones said:

"Then on the 2nd of June Mr. Kuppler called me up and said that they would go ahead—or that they would guarantee our claim. He said, 'We don't want to pay it by the 20th of June and we don't want to pay interest on it.' I told him that matter rested with Mr. McLean, who was then in Portland. I gave Kuppler his telephone number or his address." (Trans. pp. 17, 18)

Jones then said that McLean wired him on June 2nd, saying:

"that anything that was satisfactory as a guaranty to the bank to enable them to raise money would be accepted; that I could act on anything that was acceptable to the bank, if I could put it in the form acceptable to them. I went over to the First National Bank and told Mr. Philbrick what we were proposing to do. We determined to put it is in the form of a trade acceptance, so I called Kuppler back and told him that Philbrick had suggested that the simpler way to handle it would be to put it in the form of a trade acceptance. Kuppler said for me to take it up with Mr. Josiah Thomas, who was then attorney for the defendant company, and if he were agreeable to it, it would be all right. I took it up with Mr. Thomas and explained what we proposed to

do. Thomas subsequently said it was all right, to go ahead that way. So I prepared a trade acceptance, accompanied by an assignment of our claim * * * I took the trade acceptance, the assignment and this letter, Plaintiff's Exhibit 6, and called on Mr. Kuppler at the defendant's Seattle office, and showed him the trade acceptance, the assignment that I had prepared, also letter to the bank. * * * Mr. Kuppler figured the interest at $226.66 and added it in red rink on the trade acceptance; also his own initials. * * * Kuppler took me over to Miller's office, explaining the situation to the latter, the way the amount was arrived at, the method I proposed to handle it by, putting the assignment in escrow with the bank." (Trans. pp. 17, 18, 19)

"The suggestion was made either by Kuppler or Miller that I should turn the assignment over to them absolutely inasmuch as they were giving us their trade acceptance. After some discussion I did so; I did not use the letter to the bank. The trade acceptance was then signed by Miller, who signed as Fairbanks, Morse & Company by C. R. Miller, agent." (Trans. p. 20)

"I did not know on June 2nd, 1927, and do not now recall any other pending business relations between the plaintiff and the defendant." (Trans. p. 24)

"I knew Mr. Miller was the local manager of the defendant company. * * * The plaintiff corporation, prior to June 2nd, 1927, had never had any experience in the matter of the sale of

> any claim to the defendant company, nor had it obtained any trade acceptance from anyone purporting to represent the defendant, and had no information which would lead me to believe that Mr. Miller had ever previously accepted any trade acceptance. I knew in a general way that the defendant company was engaged in the manufacture and sale of machinery, particularly engines." (Trans. p. 23)

These transactions show absolutely nothing evidencing any authority in Miller to make, execute and deliver the trade acceptance in the name of the defendant.

DEFENDANT'S BY-LAWS PROHIBITED EXECUTION OF NEGOTIABLE INSTRUMENTS BY EMPLOYEES SUCH AS MILLER

Sections III. and IV. of Article VI. of the By-laws of defendant, in effect on June 2, 1927, follow:

> "SECTION III. No note, acceptance, or other obligation of the corporation for the payment of money (other than checks) shall be valid unless signed in the name of the corporation by the President, or in his absence or inability to sign, by a Vice-President, and countersigned in either event by the Treasurer, countersigned by the Secretary, and in the event of the absence or inability of both the President and a Vice-President, then such note, acceptance or obligation may be signed in the name of the corporation by the

Treasurer and countersigned by the Secretary, provided, however, the Board of Directors may, by resolution, authorize any bank or banks of de-deposit of this corporation to accept as valid notes, acceptances or other obligations of the corporations for the payment of money (other than checks) if signed in the name of the corporation by the President or a Vice-President and countersigned by the Treasurer or Secretary, or if signed in the name of the corporation by the Treasurer and countersigned by the Secretary."

"SECTION IV. No officer, agent or employee of this corporation shall sign this corporation's name as guarantor or surety upon any bond, note, contract or other instrument of any person, firm or corporation, and any such guaranty or obligation, executed in the name of the corporation shall be null and void, but nothing herein contained shall preclude the proper officer from executing as herein provided, in the name of the corporation, as principal, any bond, note, contracts or other instrument, or when authorized by a resolution of the Board of Directors of guaranteeing in the name of the corporation the payment of notes or other obligations of another corporation of which the entire capital stock is owned by this corporation." (Trans. pp. 68, 69)

TRANSACTIONS AFTER JUNE 2, 1927

Kuppler, on June 10th, in a letter to Dierks, Assistant Secretary of the defendant company at Chicago, told the story of the Sterling Steamship Corporation

account, etc., and as a part of the same reported the making and delivery of the trade acceptance (Defendant's Exhibit A-2, Trans. pp. 70, *et seq*). Boughey said this letter arrived in Chicago June 14, 1927.

> "The letter of June 10th is the first information I had in connection with the trade acceptance mentioned in plaintiff's complaint; if it had been brought to the attention of any of the officers of the home office prior to June 10, it would have come to my attention. * * * (Trans. p. 40). This letter was considered by the president, general credit manager, vice-president and treasurer and myself. Mr. Kiddoo was the vice-president and treasurer of defendant and the general credit manager's name was F. C. Dierks, who held these positions in June and July of 1927. Upon receipt of the letter just mentioned Mr. Dierks and Mr. Kiddoo made a visit to Seattle to investigate the whole matter and discussed what was the best thing to settle the whole matter; that is what they came for, to settle the whole matter after they had ascertained all the facts. At the time said letter of June 10th came in, the home office had not had any knowledge of any trade acceptance such as the one pleaded in the complaint." (Trans. pp. 39, 40)

On July 7, 1927, the defendant, through its attorneys, Cosgrove & Terhune, wrote the First National Bank of Seattle and the plaintiff, disavowing the execution and delivery of said trade acceptance by Miller in its name, and announcing its readiness to return the so-called claim assignment to the party to whom it

might belong (Defendant's Exhibit A-4, Trans. p. 79). Mr. Philbrick, for the bank, admitted the receipt of the letter of July 7, 1927 (Trans. p. 42). Plaintiff admitted receiving this letter about July 7th (Trans. p. 50).

Did Miller Have Implied Authority to Execute the Document? Was It Executed by Him Within the Apparent Scope of His Authority?

Although these questions are beside the true issues of the case, we, nevertheless, call attention to the following facts:

Miller was a local sales manager; Thompson was a local sales manager. Miller had never theretofore purchased any claim such as the plaintiffs, or accepted any trade acceptance. There was no evidence that the local office or any other office of Fairbanks, Morse & Co. had done so. The home office control of Miller's expenditures and disbursements, its carefully prepared by-laws all show that it was not only not necessary to the main purpose of the business that either Miller or Thompson have authcrity to execute trade acceptances in the name of the defendant, but that such was positively prohibited, the by-laws declaring void all such documents unless executed by those particular officials named therein and in conformity thereto. There was then no pending business between the plaintiff and the defendant. There had been no past business between them which warranted plaintiff in believing that Miller had authority to execute said trade acceptance.

This is not a case of an unincorporated plaintiff—

a person ignorant, unable to read or write, imposed upon and over-reached by a soulless corporation. On the contrary, the plaintiff is a corporation, as is the defendant. Its officers are men of experience and capacity. They knew the defendant was a manufacturing and sales corporation, with its home office in Chicago. Plaintiff had an account against the Sterling Steamship Corporation. Whether it had any priority over defendant's preferred mortgage is not certain. So far as is known, the defendant has never admitted it, notwithstanding Kuppler's conversations. The plaintiff needed money badly, and it saw a chance to get it by scaring the local representatives of the defendant. There was no effort made by Jones to inquire as to Miller's authority. The suggestion that Miller wire to his officials was made by Miller, not Jones. At that very moment, when Miller was beseeching the privilege of wiring, and Jones was giving him two days grace, the so-called assignment of the claim was already executed, it bearing the date May 31st (Trans. p. 62).

Philbrick's Warning to Jones

Philbrick, the banker, on or about the last of May, warned Jones as follows:

> "I told him that the acceptance should be accepted by the defendant by an authorized officer of the company. I told him that the paper we had had in the past had always been endorsed by Fairbanks, Morse & Company by Mr. Miller, treasurer of the company at Chicago, which Mr. Miller is not Mr. C. R. Miller." (Trans. p. 42)

From the foregoing it is seen that the plaintiff, through its representatives, descended upon the defendant's local officers demanding and threatening. The defendant was not doing business with plaintiff, and was not looking for any business. The demands and the threats and the force may have been within the law, but even so they represented compulsion. The act of Miller in signing was the result of coercion. The plaintiff ought not to be heard to say that it relied upon any implied authority, or that it believed that Miller was acting within the apparent scope of his authority, particularly for the reason that it was responsible for Miller's execution of the document.

Disavowal

Upon receipt of the Kuppler letter of June 10th, the home office sent its vice-president and its assistant secretary to Seattle to investigate and settle the whole matter (Trans. p. 39). The court in its oral announcement stated that these gentlemen were sent "to pay." Obviously the court did not understand the meaning of the word "settle" as used by the witness. Upon the facts being ascertained, the letter of July 7th followed (Trans. p. 79).

Re Status Quo and Tender Back

The court in its oral announcement seemed to feel that there was some delay in attempting a tender back. It must be remembered that the home office of the defendant did not know anything about this transaction until about June 14th, at which time it sent its officials to the west to investigate, and on July 7th the

disavowal letter was sent out. This was not an unreasonable length of time, and furthermore, no damage is claimed to have come to the plaintiff by reason of such passage of time. If the plaintiff had a lien against the vessel "Ethel M. Sterling," it could have enforced the same in the Hawaiian courts as well as at Galveston. The difficulties of a return to *status quo* were all created by the plaintiff itself. It ought not to be now finding fault.

At the time when the disavowal letter was being written, it was impossible to determine the true owner of the open account; therefore, the defendant gave written notice to both the plaintiff and the bank that it was ready to deliver back the assigned claim to the one to whom it belonged. Very little more could have been done by way of tender. That which the plaintiff left with Miller was nothing more than an assignment of its open account against the Sterling Steamship Corporation. When plaintiff received the notice of disavowal, there was nothing to prevent it from proceeding toward the collection of the claim just as if it had never made an assignment. The return of the document was not necessary.

ASSIGNMENT OF ERROR NO. 1 (Trans. p. 83)

At the opening of the case, the court, over the objection of defendant, admitted Plaintiff's Exhibits 1, 2, 3 and 4, the defendant continually calling attention to the court that the documents had not been brought to the attention of Fairbanks, Morse & Co. When it came to Plaintiff's Exhibit 5, which is the trade acceptance, defendant objected to it

> "as incompetent, irrelevant and immaterial. It does not tend to prove or relate to any of the issues of this case. It has never been brought to the knowledge of Fairbanks, Morse & Company." (Trans. pp. 83, 85)

The testimony failed to show any authority in Miller to make, execute and deliver this trade acceptance in the name of the defendant, as hereinbefore shown. Defendant knew nothing of such document until some time after it had been executed. There was no basis for its admission.

Respectfully submitted,
COSGROVE & TERHUNE,
Attorneys for Defendant.
Howard G. Cosgrove.

No. 5634

United States Circuit Court of Appeals

For The Ninth Circuit

FAIRBANKS MORSE & COMPANY, a Corporation,
Appellant,

—vs.—

LAKE UNION DRY DOCK & MACHINE WORKS,
a Corporation, *Appellee.*

UPON APPEAL TO THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT FROM THE DISTRICT
COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

IRA BRONSON,
H. B. JONES,
ROBERT E. BRONSON,
Attorneys for Appellee.

614 Colman Building,
Seattle, Washington.

THE ARGUS, SEATTLE

FILED

No. 5634

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FAIRBANKS MORSE & COMPANY, a Corporation,
Appellant,

—VS.—

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UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT FROM THE DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

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Circuit Court of Appeals
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UPON APPEAL TO THE CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT FROM THE DISTRICT
COURT OF THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION
HONORABLE JEREMIAH NETERER, *Judge*

BRIEF OF APPELLEE

This case having been tried to the court by stipulation and special findings made, there are, as we understand the rule, but three propositions which may now be urged upon this appeal:

1. Do the findings of fact support the judgment?
2. Was any error committed in the admission or exclusion of evidence?
3. Are the findings unsupported by any substantial evidence?

See

U. S. C. A. ~~Tr. 4,~~ Tit. 28, §§ 773, 875, 879;

Societe Nouvelle D'Armement v. Barnaby, 246 Fed 68 (9th Cir.);
Maryland Casualty Co. v. Jones, 27 Fed. (2nd) 521 (9th Cir.);
Newlands v. Calaveras Mining & Mllg. Co., 28 Fed. (2nd) 89 (9th Cir.),

together with the cases therein cited.

No contention is made on this appeal that the facts found are insufficient to support the judgment. Only two assignments of error are urged, one relating to the admission of plaintiff's Exhibit 5, and the other challenging the sufficiency of the evidence.

It is doubtful whether the first assignment rests upon any sufficient objection and exception to present it upon this appeal. At the opening of the case appellant objected to plaintiff's Exhibit 1 as incompetent, irrelevant and immaterial, not tending to prove or relating to any of the issues of the case, and never having been brought to the knowledge of appellant (Tr. 13). Plaintiff's Exhibit 2 was unchallenged (Tr. 14). Objection was then taken to evidence of statements made by appellant's employee, Kuppler, on the ground that there was no showing that such employee had authority to make any statements, but no exception was preserved upon the admission of this evidence (Tr. 15). To plaintiff's Exhibit 3 the appellant made "the same objections heretofore made," and upon the offer of plaintiff's Exhibit 4 asked to "have these objections run to all of these documents" (Tr. 16). Plaintiff's Exhibit 5, the admission of which is the only subject of the first assignment of error, was offered together with Exhibits 6 and 7,

upon which appellant said, "Continue these same objections the same as before and exceptions to the court's rulings" (Tr. 19). It is uncertain just what objection was sought to be preserved to the admission of plaintiff's Exhibit 5. Appellant endeavors by reference back to connect up its objections to the first exhibit as applicable to Exhibit 5, but such reference is by no means clear. It may as well have referred to the objections to the admission of the oral statements of defendant's agent, which were put on an entirely different ground.

A general, vague or indefinite objection to the evidence is insufficient to preserve the question on appeal. The specific grounds or reason for the objection as applied to the particular evidence must be pointed out. See U. S. C. A. Tit. 28, Sec. 776, Note 43, *Examiner Printing Co. v. Aston*, 238 Fed. 459 (9th Cir.). We question therefore whether there has been proper preservation of this ground of objection to entitle it to consideration on appeal.

If, however, it is properly before the court, the objection is nevertheless untenable. This suit was brought to recover upon an obligation in the form of a trade acceptance alleged to have been made, executed and delivered by the appellant. Plaintiff's Exhibit 5 is the document relied upon. It was admittedly executed and delivered in appellant's name by the manager of its business at Seattle (Tr. 13), and it was therefore upon its face decidedly material and relevant to the issues of the case, and having been executed and delivered by this general agent of the appellant company it could scarcely have been said not

to have been brought to the knowledge of the appellant.

It is not pointed out in appellant's brief how the objection applies to this exhibit. It does not raise the ultimate question of appellant's liability on the instrument as depending on the authority of its agent, or its ratification or adoption of the transaction or estoppel to repudiate the same, and any question of want of authorization or non-liability of the appellant thereon will properly come within the discussion of assignment No. II.

In treating the second assignment of error appellant is apparently expecting this court to weigh the evidence and come to a conclusion different from that reached by the trial court upon questions of fact as to which the evidence is in dispute. It sets forth fragmentary and disconnected excerpts from the evidence, presenting a confused jumble of assorted statements unrelated in sequence, which simply create confusion and uncertainty, without showing the situation that the court had before it as a basis for its findings. We shall therefore undertake to present the picture in a clearer light, taking into consideration, as we may under the rule, all of the facts or proper inferences therefrom which any of the evidence in the case tends to establish.

The appellee, Lake Union Dry Dock & Machine Works, engaged in the ship repair business at Seattle, in the fall of 1926, made certain repairs to the Motor Ship "Ethel M. Sterling" (Tr. 22). This work was performed pursuant to contract dated October 14, 1926 (Pl. Ex. 2, Tr. 56), under which final payment

was not due until March 1, 1927, and insurance was agreed to be carried on the vessel to protect appellee against loss. The appellant, which was engaged in the manufacture, sale and installation of engines, pumps, electrical equipment and the like (Tr. 44), also furnished machinery, equipment and supplies to the "Ethel M. Sterling" to the extent of approximately Fifty Thousand Dollars ($50,000.00), on which account they received a mortgage for thirty thousand eight hundred dollars ($30,800.00) under date of December 11, 1926, while the balance of approximately twenty thousand dollars ($20,000.00) was carried as an open account (Tr. 15, 65).

Mr. Walter R. Kuppler had been the credit manager of the appellant at Seattle for about fifteen years prior to January 1, 1927 (Tr. 24), and upon the organization of the Sterling Steamship Company, owner of the vessel, he became a trustee and treasurer of the corporation so that he could watch the funds (Tr. 25). His position in this respect was known at least to the local manager of the appellant (Tr. 26), and was always considered by him as being for the protection of the interests of the appellant (Tr. 43). The contract under which appellee performed its work (Pl. Ex. 2) was executed by Mr. Kuppler as treasurer. On April 6, 1927, Mr. Kuppler wrote to the appellee regarding the balance due it, then amounting to eight thousand dollars ($8000.00), inviting its assent to receive payment of this balance, four thousand dollars ($4000.00) on or before August 10, 1927, and four thousand dollars ($4000.00) on or before December 10, 1927 (Pl. Ex. 1, Tr. 54).

This communication, while on the letterhead of the Sterling Steamship Company, was undoubtedly written in the office of the appellant, as it will be noted that the initials appearing at the end thereof, "WRK-GE", are the same as those appearing on plaintiff's Exhibit 3 and defendant's Exhibit A-2, which are admittedly communications from appellant's office. It appears, therefore, that Mr. Kuppler was not only acting for the appellant in serving as an officer and trustee of the Sterling Steamship Company, but was carrying out such activities through the appellant's own office.

Upon receipt of this communication of April 6, 1927, the appellee's president and secretary called upon Mr. Kuppler at the appellant's office in Seattle and stated that it was necessary that its account be paid not later than June 20 (Tr. 13-14, 25, 32). Mr. Kuppler represented to them that the appellant was looking after the vessel and its operation and had an interest in the freight moneys, that the ship was then on its way to Galveston and that the appellee need not feel concerned because the appellant, which had a large claim against the ship, recognized that appellee's claim was superior to its own and would ultimately have to be paid (Tr. 15, 26, 28, 32). Mr. Kuppler said he would see what could be done about insurance coverage (Tr. 15), and the matter rested there until May 19th, when the appellant wrote to the appellee (Pl. Ex. 3, Tr. 57), stating that in accordance with this conversation it had placed $20,-000.00 additional insurance on the "Ethel M. Sterling" for protection of itself and the appellee, and

enclosing a copy of the insurance coverage. To this communication appellee replied on May 20th, through its attorney (Tr. 58), stating that the arrangement was unsatisfactory and that it would insist on being assured of the receipt of its money not later than June 20th.

The representatives of appellee again called upon Mr. Kuppler about the last of May, having ascertained that the vessel was due to leave Galveston on June 4th, and notified him that appellee proposed to libel the vessel there for its claim unless some satisfactory adjustment was made (Tr. 16, 33). Mr. Kuppler requested them not to libel the ship, saying that appellant could not afford to have that happen and would have to take care of the matter in some way and thereupon took the parties in to see Mr. Miller, the manager of appellant's Seattle branch, and explained the situation to him. Some controversy occurred as to whether the appellee was unduly insistent on its rights, which is not material here. It was made clear that the appellee proposed to libel the vessel at once before it could leave Galveston unless its claim should be taken care of in some satisfactory way (Tr. 17, 25, 33). Mr. Miller and Mr. Kuppler both recognized that appellee's claim was superior to that of appellant, having been so advised by their attorney (Tr. 26, 28, 48), and Mr. Miller finally stated in effect that the appellant would have to take care of the matter and requested time within which to take it up with his people and it was agreed that it should go over for two days (Tr. 17, 33, 46-48).

Prior to this time and under date of May 21, 1927,

Mr. Miller had reported to A. W. Thompson, Pacific Coast manager for the appellant at Los Angeles, setting forth in general the financial status of the "Ethel M. Sterling" and reporting on her movements and stating that

> "We have succeeded in having the charter assigned to us. We will, therefore, receive this money, and with our libel claim, we should be able to have assigned to us any future charters." (Pl. Ex. 9, Tr. 63-66)

Immediately following the conference last referred to Mr. Miller wired to Mr. Thompson (Pl. Ex. 8, Tr. 63) setting forth that appellee threatened to libel the ship, which would cause the appellant heavy loss, and suggesting that appellant assume the payment of this bill. To this message Mr. Thompson replied by a telegram (Pl. Ex. 10) asking if their mortgage did not have priority over appellee's claim. Miller answered that appellee's claim ante-dated their mortgage and that their attorneys advised that the claim was prior thereto (Tr. 66-67). Thereupon, Thompson wired Miller (Pl. Ex. 8, Tr. 62) that the matter "must be left to your good judgment," warning him that they "must not under any circumstances jeopardize the sum now involved," but suggesting that they give a guarantee of payment in preference to laying out the cash.

Upon receipt of this telegram Mr. Kuppler got in touch with the appellee's representatives and advised them that appellant was willing to guarantee payment of the claim and it was arranged between them that the matter should be handled in such form as would

be acceptable to the First National Bank of Seattle, with which both parties did business, so as to enable the appellee to raise funds thereon. The appellant wanted to avoid paying out the cash immediately and the appellee wanted to be in a position to realize on the claim and to this end the bank suggested handling the matter by a trade acceptance. This suggestion was communicated to Mr. Kuppler and at his request referred to Mr. Josiah Thomas, attorney for the appellant, who approved this method of handling the transaction (Tr. 18, 27, 33, 41, 42).

Thereupon, appellee's attorney prepared a trade acceptance (Pl. Ex. 5), an assignment to the appellant of its claim (Pl. Ex. 7), and a letter to the First National Bank (Pl. Ex. 6), transmitting to it the said assignment with directions to deliver same to the appellant upon the payment of the trade acceptance, and took these instruments to Mr. Kuppler at appellant's office (Tr. 18-19, 27-29). Mr. Kuppler checked over the documents and O.K.'d the trade acceptance and then took appellee's attorney in to Mr. Miller, and explained to the latter the method adopted for handling the situation. To use Mr. Miller's words as given in the bill of exceptions:

> "Kuppler said our attorney advised this trade acceptance was the right way to handle the situation. I then called up Mr. Thomas on the phone and asked him about it and he said he understood the situation and that it was the proper thing to do. After he so advised me, I signed it." (Tr. 49)

At the same time protest was made by the appellant

against the placing of the assignment in escrow with the bank and it was thereupon at appellant's request turned over to it absolutely and remained in its possession until the date of trial (Tr. 19, 20, 27, 28).

The appellee thereupon abandoned any further claims against the vessel and shortly afterwards at the appellant's request released its interest in the insurance, as set forth in plaintiff's exhibit 3. The trade acceptance was discounted with the First National Bank, but upon maturity was dishonored and payment refused by the appellant (Tr. 20).

The "Ethel M. Sterling" sailed from Galveston in due course, passing through the Panama Canal about June 22nd, 1927 (Pl. Ex. 13, Tr. 68), and upon arrival at Hawaii was libeled by appellant on account of its own claims and bought in by it in such proceeding (Tr. 22).

In the meantime, under date of June 10, 1927, Mr. Kuppler for the Seattle branch, wrote to appellant's head office a thorough report on the transaction (Pl. Ex. A-2), and we particularly call to the court's attention that portion of that letter appearing on pages 70, 71 and the first half of 72 of the transcript. This was received by the appellant at its head office in Chicago on June 14th, and thereupon considered by the president, general credit manager, vice president and treasurer, and secretary (Tr. 39). On the following day a telegram was sent from the head office to Mr. Kuppler at the Seattle branch (Pl. Ex. 11, Tr. 67), referring to this letter and directing the placing of additional insurance to protect appellant's interest in the "Ethel M. Sterling." No comment was

made on the arrangement regarding appellee's claim at this time, or until July 7, 1927, when a letter was written, stating that Fairbanks Morse & Co. had "just learned" of the transaction, and that it thereby repudiated the act of Mr. Miller in giving the acceptance (Def. Ex. A-4, Tr. 79-80). The assignment which had been delivered to the appellant was not returned nor was there any reinstatement of the insurance which had theretofore been placed in favor of the appellee and which it had consented might be cancelled.

A few words may be added respecting the authority of Mr. Miller, the appellant's manager at Seattle. He had been acting in this capacity for some eight years at the time of this transaction (Tr. 43), having charge of territory comprising Washington, Oregon, Idaho, part of Montana and all of Alaska (Tr. 25), and having an organization consisting of himself as manager, a credit manager, Mr. Kuppler, who had been with the defendant in that capacity for about fifteen years (Tr. 24, 25), and various departments with department managers and salesmen covering the territory. It was his duty to see that the goods manufactured by the appellant were sold, installed and serviced and the accounts collected (Tr. 44). There was no written record of his authority (Tr. 38). Any limitation thereon was contained only in the company's records which were kept at Chicago (Tr. 40), and was unknown to the appellee. Mr. Miller had authority in the matter of contracts up to $5000.00, and above that sum they were referred to Mr. A. W. Thompson at Los Angeles, the manager of the appellant for the entire Pacific Coast, whose jurisdiction

extended as far east as Salt Lake City (Tr. 25, 31 and 44).

From the correspondence comprised in the exhibits it appears that it was customary for the local office to report to Mr. Thompson upon all matters of general importance and look to him for its authority and direction.

While the local branch had not previously purchased any accounts as large as this one, it had taken similar assignments of smaller accounts to protect its interest in other boats (Tr. 29). Mr. Miller was also in the habit of negotiating municipal warrants, many of which were handled through the bank every month (Tr. 30).

That the local branch had large responsibility and authority in the carrying on of the business is clearly apparent from the various reports and communications contained in this record relating to this particular case of its installation of engines and equipment in the "Ethel M. Sterling." Here was a matter of sales amounting to $50,000.00, which apparently was handled entirely by the Seattle office on its own responsibility, without more than a report to the Pacific Coast manager (Tr. 63-66; 70-79). Its contract with the Sterling Steamship Company for the installation of these engines was negotiated and executed on behalf of the appellant by Mr. Whitehead, a local salesman (Tr. 45, 46). It was the duty of the local office to pass on the credits of its customers and make the collections (Tr. 45). It permitted its credit manager to become the trustee and treasurer of the Sterling Steamship Company (Tr. 26), and to carry on cor-

respondence from its office in the name of that company (Pl. Ex. 1). The additional $20,000.00 insurance mentioned in plaintiff's Exhibit 3 was effected through the local office, and it was handling and collecting on the charters and in fact practically managing the operation of the vessel itself at this time (Pl. Ex. 9, See particularly Tr. 65-66). It was making advances for the operation of the vessel, which for the month preceding June 10, 1927, amounted to $8534.38 (Pl. Ex. A-2, Tr. 70). It was contracting for the cargo for the vessel from Galveston (Tr. 76), and it expected to advance further sums on account of the voyage to Honolulu and was endeavoring to arrange for a return cargo (Tr. 78). It was, in fact, acting as the operating manager of the vessel.

On June 22, 1927, when the "Ethel M. Sterling" arrived at Colon, it called on the Seattle office for an advance of twenty-five hundred dollars which the Seattle branch applied to the Pacific Coast manager to furnish (Pl. Ex. 13, Tr. 68).

The submission of these matters by the Seattle branch to the Pacific Coast manager and the acceptance of the latter's direction was apparently recognized by the appellant's organization as the regular and proper method of handling such business, and no word of complaint or disapproval thereof is contained in the record, nor is there any denial or disavowal of Mr. Thompson's authority to act for the appellant under such circumstances.

All of these facts and surrounding circumstances were before the trial court and support his conclusion as expressed in his opinion (Suppl. Tr. 6), and in

finding No. 5 (Suppl. Tr. 9) that Miller had the apparent and necessary authority in connection with his management of appellant's business to purchase appellee's claim as incident to and for the protection of appellant's interest in the vessel, and that Mr. Thompson had the authority to and did expressly authorize Miller to handle the transaction in the way that was done. All of this evidence furnishes substantial support for the court's finding in this respect.

The appellant has stated a number of general propositions relating to agency with which for the most part we have no complaint, except that they are not applicable to the present case. The question of the apparent and express authority under which Miller acted in executing this trade acceptance was one of fact. The court has found that it existed and there being substantial evidence to support such finding there is no question of law involved. However, should authority be thought necessary, we call particular attention to the decision of this court in *Cox v. Robinson*, 82 Fed. 277, an appeal from a decision by Judge Hanford, in which the facts are, in certain respects, very similar to this case. It was there said:

> "The acting head of a corporation, whether it is president, vice-president, cashier, or general manager, through whom and by whom the general and usual affairs of the corporation are transacted which custom or necessity has imposed upon the officer,—such act being incident to the execution of the trust imposed in him,—may be performed by him without express authority; and in such case it is immaterial whether

such authority exists by virtue of the office or is imposed by the course of business as conducted by the corporation."

And we call particular attention to the quotation at page 284 from *Merchants Bank v. State Bank*, 10 Wall. 604, 644, announcing the principles that should govern such dealings, and holding that the question of authority or estoppel is for the jury, or in this case, the court.

Under the decisions of the State of Washington and probably also under Sec. 3410 of Remington's Compiled Statutes (app. br. p. 6) the powers of a corporate agent regarding negotiable paper are to be determined by the same rules as apply to other transactions.

The Supreme Court of Washington has held in a long line of cases that where one has been placed in the position of manager by a corporation and executes a contract on its behalf that is within its corporate powers, the presumption is that he acted with due authority and the burden is on the corporation to prove the contrary. This rule applies to negotiable instruments as well as other contracts.

Carrigan v. Improvement Co., 6 Wash. 590;
Citizens National Bank v. Wintler, 14 Wash. 558;
Parr v. Pac. Storage Warehouse, 124 Wash. 26.

In *Kitzmiller v. Pacific Coast and Norway Packing Co.*, 90 Wash. 357, the court said (p. 362):

"As 'general manager' without any limitations or restrictions as to his express authority,

he had implied authority to
the corporation could lawfull
scope of its business."

And in *Willis v. MacDougall*
Wash. 330, where the same rule
was held that the agent's denial o
not sufficient to rebut the presum
question of authority was still o
determination of the jury under
circumstances.

The same rule was applied to t
manager of a foreign corporation
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The appellant is also liable in t
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make any repudiation effective and withou
was incomplete.

In *Albright v. Sunset Motors*, 148 Was
was held that where one had assigned a c
corporation, the retention of the assignm
disapproval of the transaction by the co
amounted to a ratification. It was conte
there was no more obligation upon the corp
return the assigned claim than upon the a
request its return:

> "But we think this mistakes the dut
> parties. As matters stood, it was the
> tion's duty to act, since the agreement
> submitted to it for ratification." (p. 3

Finally, the appellant has received the f
of the assignment of appellee's claim and it
grossly unjust to permit it to escape its o
It was admitted time after time that this
superior to the appellant's mortgage a

Stilwell v. Merriam Co., 127 Wash. 116;
Riverside Finance Co. v. Otis Automatic Train Control, 140 Wash. 495.

"It is not in harmony with any sound code of ethics, and is not the policy of the law, to permit a solvent corporation to obtain and appropriate the property of another on the credit of its solvency, and then escape responsibility by hiding behind some impecunious office of such company."

Rowland v. Carroll Loan & Investment Co., 44 Wash. 413;
Livieratus v. Commonwealth Security Co., 57 Wash. 376.

We do not charge that appellant deliberately schemed to induce this claimant to forego its certain rights, relying upon its contract made in good faith with appellant's representative, and then when the subject matter had been gotten as far beyond practical control as possible, to appropriate the whole thereof to his own claim, leaving the appellee to bear the entire loss through a disavowal of the acts of its agent from which it had received the benefit. But regardless of appellant's intent, the result is the same and the appellee should be protected against such an injustice.

We submit therefore that the court's findings that the execution of the trade acceptance was authorized, both expressly and impliedly, and within the apparent scope of the agent's authority, is supported by substantial evidence and not now open to question, and that in any event the appellant is liable through hav-

ing ratified the transaction by not promptly disavowing the same, to the prejudice of the appellee, and is estopped to deny it by having retained the benefits thereof.

Respectfully submitted,

IRA BRONSON,
H. B. JONES,
ROBERT E. BRONSON,
Attorneys for Appellee.

No. 5636

8

United States
Circuit Court of Appeals
For the Ninth Circuit.

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED
DEC 8 - 1928
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5636

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. GROSSCUP, MORROW and WALLACE,
Solicitors for Appellant,
920 Republic Building, Seattle, Washington.

J. O. DAVIES, Esquire, Solicitor for Appellant,
609 Lowman Building, Seattle, Washington.

Messrs. POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Appellee,
977 Dexter Horton Building, Seattle, Washington.

W. H. ABEL, Esquire, Solicitor for Appellee,
Montesano, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 596.

RUBY M. GAUNT,
Complainant,

vs.

VANCE LUMBER COMPANY, a Corporation,
Defendant.

*Page-number appearing at the foot of page of original certified Transcript of Record.

BILL OF COMPLAINT.

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Northern Division, Sitting in Equity.

Complainant Ruby M. Gaunt, a citizen of Oregon, residing in Portland, brings this, her bill of complaint, against the Vance Lumber Company, a corporation, of Seattle, Washington, and for cause of action complains and alleges:

I.

That the complainant is now a citizen of the State of Oregon and resides at Portland in said state.

II.

That the defendant, Vance Lumber Company, at all times herein mentioned was and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business in Seattle, State of Washington, and is a citizen of said state.

III.

That the amount involved in this bill of complaint exceeds the sum of $3,000.00, exclusive of interest and costs.

IV.

That at all of the times herein mentioned the defendant [2] was the owner of certain timber, timber and logged-off lands, sawmill, planing-mill,

shingle-mills, dry kilns, dry lumber-sheds, office and store buildings, stock of merchandise, hotel, about sixty-five cottages, pool-hall and picture-show house, a railroad, and railroad and logging equipment in Grays Harbor and Thurston Counties in the State of Washington, at and near the town of Malone; all the said property, both real, personal and mixed, was owned and used by the defendant in the conduct of its logging, lumbering and lumber manufacturing business at said place. The said timber, timber and logged-off lands, railroad and personal property being more particularly described as follows, to wit:

The Northeast Quarter (NE.¼) of Section Two (2); The East one-half (E.½) and the Southeast Quarter (SE.¼) of the Northwest Quarter (NW.¼), and the Northeast Quarter (NE.¼) of the Southwest Quarter (SW.¼), Lots Five (5) and Six (6) all in Section Six (6); Section Eight (8); all in Township Seventeen (17) North, Range Four (4) West, W. M.

Lots One (1) and Two (2) of Section Two (2); Lots One (1), Two (2), Three (3) and Four (4) of Section Four (4), except a strip at the Southeast (SE.) corner of Lot One (1), described as follows: Beginning at the Southeast (SE.) corner of Lot One (1), thence North (N) forty (40) rods, thence West (W) eight (8) rods, thence South (S) forty (40) rods, thence East (E) eight (8) rods to place of beginning. The Southeast Quarter (SE.¼) of Section Nine (9); The South one-

half (S.½) of Section Ten (10), excepting and reserving the following tracts of land:

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to Sections 9, 10, 15 and 16, T. 17 N., R. 5 West, W. M.; thence north a distance of 302.8 feet; thence No. 55° 33′ E. a distance of 450 feet; thence S. 34° 27′ East, a distance of 499 feet to a point which is 50 feet at right angles to the center line of the Vance Lumber Co.'s railroad track; thence S. 75° 50′ West parallel to and 50 feet distant from the center line of aforesaid tract to the South line of Section 10; thence westerly along said section line 141 feet to place of beginning. Which tract #1 contains 4.98 acres, more or less.

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to the sections 9, 10, 15 and 16, T. 17 N., R. 5 W., W. M.; thence north a distance of 302.8 feet; thence N. [3] 55° 33′ E. a distance of 450 feet which point is the point of beginning of tract No. 2; thence N. 55° 33′ E. a distance of 400 feet; thence South (S.) 34° 27′ East (E.) a distance of 635 feet to a point which is 50 feet at right angles from the center line of the Vance Lumber Co.'s railroad track; thence southwesterly along a line which is paralley to and 50 feet distant from the aforesaid tract to the northerly line of tract No. 1; thence N. 34° 27′ West along northerly line of tract No. 1 a distance of 499 feet to place of begin-

ning. Which tract No. 2 contains 5.20 acres, more or less.

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to sections 9, 10, 15 and 16, T. 17 N., R. 5 W., W. M.; thence north a distance of 302.8 feet; thence north 55° 33′ E. a distance of 850 feet to a point which is the point of beginning of Tract No. 3; thence N. 55° 33′ E. a distance of 350 feet; thence S. 34° 27′ E. a distance of 578 feet to a point which is 50 feet from and at right angles to the center line of the Vance Lumber Company's railroad track; thence on a curve to the right, having a radius of 523.14 feet and paralley to the center line of aforesaid tract to the northerly line of Tract No. 2 of garden tracts; thence North 34° 27′ West along northerly line of Tract No. 2 a distance of 636 feet to place of beginning. Which tract contains 5.05 acres, more or less.

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to sections 9, 10, 15 and 16 in T. 17 N., R. 5 W., W. M.; thence North 302.8 feet; thence North 55° 33′ East a distance of 1200 feet to a point which is the point of beginning of tract No. 4; thence N. 55° 33′ E. a distance of 218 feet; thence North 2° 08′ E. a distance of 342 feet; thence S. 28° 39′ 5″ to the beginning of a curve having a radius of 397.68 feet; thence on a curve to the right, having a radius of 397.68 feet for a distance of 277 feet to a tangent; thence at right angles to said tangent on a bearing of S. 78° 44′ E.

for a distance of 30 feet; thence S. 11 14′ W. parallel to and 50 feet from the center line of the Vance Lumber Co.'s railroad track, for a distance of 216.5 feet; thence on a curve to the right with a radius of 666.34 feet to the northerly line of Tract No. 3; thence N. 34° 27′ W. along northerly line of tract No. 3 a distance of 578 feet to place of beginning. Which tract contains 4.14 acres, more or less.

The Northeast Quarter (NE.¼) of Section Ten (10); Section Eleven (11); The North one-half (N.½) and the Southeast Quarter (SE.¼) of Section Twelve (12); The West one-half (W.½) of the Southeast Quarter (SE.¼) of Section Fifteen (15); The West one-half (W.½) of the Southeast Quarter (SE.¼); The North one-half (N.½) of the Northwest Quarter (NW.¼) of (NW.¼) and the South one-half (S.½) of the Southwest Quarter (SW.¼) of Northwest Quarter (NW.¼), less county road right of way; the Southeast Quarter (SE.¼) of the Southeast Quarter (SE.¼), the Northwest Quarter (NW.¼) of the Southwest Quarter (SW.¼), excepting a strip of land two hundred (200) feet square in the Southwest (SW.) corner; excepting also [4] the old Mox-Chehalis county road and the new Mox-Chehalis county road and that portion deeded by the defendant to School District Number Five. The Southwest Quarter (SW.¼) of the Southwest Quarter (SW.¼), excepting the right of way of the Northern Pacific Railroad Company and the county road; excepting also tract of land South (S.) and West (W.) of said railroad right of way, known as Tax

Number Six (6); The Southeast Quarter (SE.¼) of the Southwest Quarter (SW.¼) and the Northeast Quarter (NE.¼) of Southwest Quarter (SW.¼), excepting that part thereof deeded by the defendant to School District Number One Hundred Five, excepting also the new Mox-Chehalis county road. That part of the Southwest Quarter (SW.¼) of the Northeast Quarter (NE.¼) lying South (S.) and East (E.) of the Mox-Chehalis County Road; also a strip of land sixty (60) feet wide across the Southeast Quarter (SE.¼) of the Northeast Quarter (NE.¼), same being thirty (30) feet wide on each side of the railroad of the defendant as now laid out, of Section Sixteen (16); The South one-half (S.½) of the Southeast Quarter (SW.¼) of Southeast Quarter (SE.¼) with easement of passage over Daniel McKay private road, which roadway is twelve (12) feet wide and extends across the North one-half (N.¼) of SW.¼ of Southeast Quarter (SE.¼) and N.½ of SE.¼; that portion of the Northeast Quarter (NE.¼) of the Southeast Quarter (SE.¼) lying North (N.) and East (E.) of the Northern Pacific Railway right of way, less county roads; also excepting Tax Number One (1) being a strip of land lying South (S.) of county road to mill; excepting also tract of land described as follows: Beginning at the South (S.) line of the Southeast Quarter (SE.¼) of the Northeast Quarter (NE.¼) of Section Seventeen (17) T. Seventeen (17) North, Range 5 West, W. M., North (N.) and East (E.) of County Road, thence Southeasterly 43° 48′ East

along County Road 219 feet; thence North (N.) 80 32′ East 258.6 feet; thence North 29° 20 East 165 feet to the South line of said forty (40) acre tract, all in Section Seventeen (17).

The Southwest Quarter (SW.¼) of the Northeast Quarter (NE.¼), the Northwest Quarter (NW.¼) of the Southeast Quarter (SE.¼), that part of Lot Five (5) lying North (N.) and East (E.) of county road all in Section Twenty-one (21); the North one-half (N.½) of the Northwest Quarter (NW.¼), the Southwest Quarter (SW.¼) of the Northwest Quarter (NW.¼), and the Northwest Quarter (NW.¼) of the Southwest Quarter (SW.¼), Section Twenty-two ((22), all in Township Seventeen (17) North, Range 5 West, W. M.

The West one-half (W.½) of the Southwest Quarter (SW.¼); The Northeast Quarter (NE.¼) and the North one-half (N.½) of the Southeast Quarter (SE.¼) of Section Twenty (20); The West one-half (W.½) of Section Twenty-two (22); The Southeast Quarter (SE.¼) of Section Twenty-six (26); The Northeast Quarter (NE.¼) of Section Twenty-eight (28); Sections Twenty-nine, Thirty (30), Thirty-one (31) and Thirty-two (32); The Southwest Quarter (SW.¼) and the South one-half (S.½) of the Northwest Quarter (NW.¼) and the Northeast Quarter (NE.¼) of the Northwest Quarter (NW.¼) and the Northwest Quarter (NW.¼) of the Northeast Quarter (NE.¼), Section Thirty- [5] *Section Thirty-*four (34), all in Township Eighteen (18) North, Range 4 West, W. M.

Section Twenty-five (25); the East Forty (40) rods of the Northeast Quarter (NE.¼) of the Northeast Quarter (NE.¼) of Section Twenty-six (26); the Southeast Quarter (SE.¼) of Section Thirty-two (32); the Southwest Quarter (SW.¼) and the Northeast Quarter (NE.¼) of the Southeast Quarter (SE.¼) of Section Thirty-four (34); the North one-half (N.½) and the Southeast Quarter (SE.¼) and the North one-half (N.½) of the Southwest Quarter (SW.¼) of Section Thirty-five (35); Section Thirty-six (36), all in Township Eighteen North, Range 5, West W. M.

Also a railroad described as follows:

The logging railroad of the vendor, commencing at its junction with the Northern Pacific Railway at Malone, in Section Seventeen, Township Seventeen North, Range Five West, W. M., thence across Section Sixteen, Section Fifteen, Section Ten, Section Three, Section Two, and Section One, all in said township; thence across Section Thirty-six in Township Eighteen North, Range Five West, W. M., thence across Section Thirty-one and Section Thirty in Township Eighteen North, Range Four West, W. M., including therein all easements for grade and roadbed; also the rails, bridges, anglebars, switch materials, frogs, and all spurs, sidings and branches, said railroad in part extending across the lands agreed to be conveyed as above described, and also including the following:

Beginning at the point which is the section corner common to Sections Nine, Ten, Fifteen and Sixteen in Township Seventeen North, Range Five

West, W. M., and thence South along the West line of Section Fifteen for a distance of Three Hundred and Fourteen and Nine-tenths feet; thence North Thirty-four degrees Thirty-one minutes for a distance of Thirty-three and Seven-tenths feet, thence on a curve to the right, said curve having a radius of Six Hundred and Eighty-six and Three-tenths feet, for a distance of Four Hundred and Ninety-two and Six-tenths feet; thence on the tangent of said curve which bears North Seventy-five degrees Forty-seven minutes East, for a distance of One Hundred Sixty-nine and Eight-tenths feet to a point on the North line of Section fifteen; thence South Eighty-seven degrees Four minutes West along the North line of Section Fifteen for a distance of Five Hundred and Eighty and Six-tenths feet to place of beginning; also including the tract of land commencing at a point on the section line One Hundred and Six feet West of the Northeast corner of Section Sixteen, Township Seventeen North, Range Five West, W. M.; thence West along the North line of said Section to a point One Hundred and Sixty-four feet from the point of beginning; thence Southeasterly Eighteen degrees South ten degrees East to a point Three Hundred and Sixty-one feet from Section line at point of intersection with said railroad right of way; thence Northeasterly [6] along said right of way Three Hundred and Forty feet to point of beginning; also beginning at the Northeast corner of Section Sixteen, Township Seventeen North, Range Five West, W. M., thence

South on Section line between Sections Fifteen and Sixteen, variation Twenty-five degrees Thirty minutes East Six Hundred and Sixty-six and Two-tenths feet; thence West One Hundred and Ninety-five feet to intersection of the East line of said railroad; thence Northwesterly on said railroad right of way line to its intersection of the North line of said Section sixteen, thence East Forty-five and Two-tenths feet to the place of beginning; also a strip of land for railway right of way Sixty feet wide across the North Thirty acres of Northeast Quarter of Northeast Quarter of said Section Sixteen, the same being thirty feet on each side of said railroad as laid out (subject to leasehold agreement contained in vendor's title deed); also a strip of land Sixty feet wide across the South ten acres of the Northeast Quarter of Northeast Quarter of said Section Sixteen, Township Seventeen North, Range Five West, W. M., the same being Thirty feet on each side of said railroad as laid out.

Also the following described personal property:

Also all buildings and fixtures upon the said lands, and also the following described personal property: Sawmill building, power plant, machine-shop, machinery, supplies, shingle-mills and all machinery therein, shingle-mill, dry kilns, planing-mill and machinery and dry kilns, hotel and equipment, store and office building, stock of merchandise and office equipment, pool-hall and picture-show house and equipment; sixteen logging engines with all lines, blocks, and equipment; two steam shovels, one 63-ton Heisler geared locomo-

tive, one 50-ton Heisler geared locomotive, one Baldwin locomotive, class 12–30¼ E–88 No. 55804, all logging trucks, about forty-one in number, three wood racks, eight flat cars, six gravel cars, one steel moving car, three oil-tank cars, camp cars and equipment, all rails and supplies therewith, stock of lumber on hand on January 1, 1924; all logs in pond and in woods and all other personal property owned and used by the vendor at Malone, Washington, in its logging and lumbering operations, excepting and reserving, however, its books of entry and account, its office files, accounts receivable and bills receivable and all lumber and logs shipped or billed prior to January 1, 1924.

V.

That for a long time prior to the fifth day of July, 1923, this complainant and the defendant had been negotiating for the sale of defendant's property as hereinbefore described, and it was the intention of the defendant to employ complainant [7] to find a purchaser, and it was the intention of the complainant to find a purchaser for all the property belonging to the defendant as hereinbefore set forth and described, and it was the intention of the defendant to pay as compensation for the sale of said property or the finding of a purchaser therefor a commission of two per cent upon the sale price of said property.

That it was understood and agreed by and between said parties that the defendant would give to the complainant a contract authorizing her to find a purchaser for said property, provide for

a commission for finding a purchaser for said property and would describe defendant's said property in said contract. That for the purpose of consummating said agreement, intention and understanding the defendant did, on the fifth day of July, 1923, make, sign and deliver to the complainant a memorandum in writing authorizing the complainant to procure a purchaser for its said property, providing therein for a commission of two per cent of the sale price of said property, and describing a part of said property. That the defendant knew the description of its said property. That the complainant did not know the description of defendant's property. That at the time the defendant delivered said memorandum of agreement to this complainant it represented to her that the said memorandum contained a description of all its said property then owned by it in Grays Harbor and Thurston Counties, in connection with its said logging and lumbering operations.

That this complainant believed and relied upon the representation of the defendant so made to her and acted thereon and procured the Mason County Logging Company, to buy, and [8] the Mason County Logging Company did buy all of defendant's said property. That the defendant well knew that said memorandum of agreement did not describe all of its said property and did not contain a description of all the property which it had offered for sale and agreed to sell, or which she and the said defendant had understood and

agreed was to be sold and described in said memorandum of agreement.

This complaint alleges that the representation of the defendant so made to her, that said memorandum contained a description of all its property was not true and was made either with the intention on the part of the defendant to mislead and deceive this complainant, or if said misrepresentation was not intentional it was by mistake resulting in depriving complainant of her commission for procuring the Mason County Logging Company to buy said property. That this complainant did not know that said representations were not true and did not in fact know that a part of said property had been omitted from their memorandum of agreement until after said property had been sold.

That if the failure of the defendant to describe all its said property in said memorandum of agreement in accordance with their previous understanding and intention was not intentional, then it was due to the mutual mistake of the defendant and this complainant in that the defendant at the time it drafted said memorandum of agreement did by mere accident, inadvertance and mistake leave out and omit from said memorandum of agreement that portion of its said property described in paragraph IV contained in Sections 26, 32 and 34, Township 18 North, Range 5 West, W. M., and Sections 2, 4, 9, 10, 16, 17 and the West one-half of the Northwest Quarter of Section 11, [9] Township 17 North, Range 5 West, W. M. And that this omission from said memorandum of agree-

ment was not known to complainant or discovered by her until after the sale of said property to the Mason County Logging Company, the purchaser procured by the complainant. And that her failure to discover or ascertain the fact that said property had been omitted from said memorandum of agreement was due entirely to her inadvertance, accident and mistake.

VI.

That there is now justly due and owing the complainant from the defendant under said contract of employment the sum of $50,000.00, together with interest thereon at the rate of six per cent (6%) per annum from January 9th, 1924. That by reason of said mutual mistake and inadvertance of the parties, or the mistake and inadvertance of the complainant and the fraud of the defendant as aforesaid, the complainant cannot enforce said contract of employment and recover the full amount of her commission now due and owing her in an action at law. That the complainant has no plain, speedy or adequate remedy at law.

WHEREFORE, complainant prays:

I.

For a decree of this Court reforming said written contract of employment of July fifth, 1923, by including therein a description of the property omitted, particularly the property described in Paragraph V of this bill of complaint.

II.

For a decree of this Court enforcing said con-

tract of employment as and when reformed according to the principles [10] applicable, by granting a money judgment in favor of the complainant and against the defendant for the sum of $50,000, with interest thereon at the rate of six per cent (6%) per annum from January ninth, 1924, to date of judgment, together with costs of suit.

CHAS. A. WALLACE,
J. O. DAVIES,
Solicitors for Complainant.

GROSSCUP, MORROW & WALLACE,
Of Counsel.

Office and P. O. Address: 2600 L. C. Smith Building, Seattle, Washington.

[Endorsed]: Filed Aug. 30, 1927. [11]

[Title of Court and Cause.]

ANSWER TO BILL OF COMPLAINT.

Now comes the Vance Lumber Company, a corporation, defendant in the above-entitled action, and answering the bill of complaint of the complainant says:

I.

That whether the complainant is now a citizen of Oregon and resides at Portland in said state, this defendant has not sufficient information upon which to base a belief, and therefore denies the same.

II.

The defendant, Vance Lumber Company, admits

that at all times herein mentioned it was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal office and place of business in Seattle, State of Washington, and is a citizen of said state.

III.

The defendant denies that the amount involved in this case exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs, or that there is any sum involved in this action.

IV.

This defendant admits that on the 5th day of July, 1923, and at all times thereafter up to and including the 9th day of January, 1924, it was the owner of certain timber, timber and logged-off lands, sawmill, planing-mill, shingle-mills, dry kilne, dry lumber-sheds, office and store buildings, stock of merchandise, [12] hotel, about sixty-five cottages, pool-hall and picture-show house, logging equipment, and about fourteen miles of standard gauge railroad in Grays Harbor and Thurston Counties, in the State of Washington, at or near the town of Malone; that said property, both real, personal and mixed was owned and used by the defendant in the conduct of its logging, lumbering and lumber manufacturing business at said place; that it owned the following described lands situated in Grays Harbor and Thurston Counties, State of Washington.

NE.¼ of	Section 2)	
E.½, & N.½ of SW.¼, S.½ of NW.¼	Section 6)	Twp. 17 North,
All of	Section 8)	Range 4 West.
E.½, NW.¼ of	Section 12)	
S.½, NE.¼, E.½ of NW.¼	Section 11)	
W.½ of SE.¼	Section 15)	Twp. 17 North,
W.½ of SW.¼, W.½ of NW.¼, NE.¼ of NW.¼	Section 22)	Range 5 West.
SW.¼ of NE.¼, NE.¼ of SE.¼	Section 21)	
NE.¼ of NE.¼	Section 28)	
NE.¼, N.½ of SE.¼, W.½ of SW.¼	Section 20)	
W.½	Section 22)	
SE.¼	Section 26)	Twp. 18 North,
NE.¼	Section 28)	Range 4 West.
All of Sections 29–30–31–32	)	
NW.¼ of NE.¼, E.½ of NW.¼, SW.¼ of NW¼, SW.¼	Section 34)	
All of Sections 25–36.	)	Twp. 18 North,
N.½, SE.¼, N.½ of SW.¼	Section 35)	Range 5 West.

That it also owned land in Sections 10, 16, 17, Township 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, is situated; that owing to the defective description, it has not sufficient information as to whether the lands described in paragraph IV of complainant's bill of complaint other than what is admitted herein, at said time belonged to this defendant, and therefore denies the same.

V.

This defendant denies that for a long time prior to the 5th day of July, 1923, or any other time, the complainant and the defendant had been negotiating for the sale of defendant's property, and denies that it was the intention of the defendant to employ [13] complainant to find a purchaser, and denies that it was the intention of complainant to find a purchaser for all of the property belonging to the defendant as described in the bill of complaint, and denies that it was the intention of the defendant to pay as compensation for the sale of said property, or the finding of a purchaser therefor a two per cent commission of the sale price of said property.

This defendant denies that it was understood and agreed by and between the said parties that the defendant would give to the complainant a contract authorizing her to find a purchaser for said property, and denies that it would provide for a commission for finding a purchaser for said property, and denies that it would describe defendant's

said property in said contract. This defendant denies that for the purpose of consummating said agreement the defendant on the 5th day of July, 1923, or at any other time, made, signed and delivered to the complainant a memorandum in writing authorizing the complainant to procure a purchaser for its said property, and providing therein for a commission of two per cent of the sale price of said property, and describing a part of said property. Admits that the defendant knew the description of its said property. Denies that the complainant did not know the description of defendant's property. This defendant denies that it ever delivered a memorandum of agreement to the complainant, or represented to her that said memorandum contained a description of its said property then owned by it in Grays Harbor and Thurston Counties in connection with its said logging and lumbering operations.

This defendant denies that it made any representations to the complainant, or that the complainant relied thereon. This defendant denies that the complainant procured the Mason County Logging Company to buy the defendant's said property. The defendant alleges the truth to be that the said property so sold to the [14] complainant to find a purchaser, and denies that it was the intention of complainant to find a purchaser for all of the property belonging to the defendant as described in the bill of complaint, and denies that it was the intention of the defendant to pay as compensation for the sale of said prop-

erty, or the finding of a purchaser therefor a two per cent commission of the sale price of said property.

This defendant denies that it was understood and agreed by and between the said parties that the defendant would give to the complainant a contract authorizing her to find a purchaser for said property, and denies that it would provide for a commission for finding a purchaser for said property, and denies it would describe defendant's said property in said contract. This defendant denies that for the purpose of consummating said agreement the defendant on the 5th day of July, 1923, or at any other time, made, signed and delivered to the complainant a memorandum in writing authorizing the complainant to procure a purchaser for its said property, and providing therein for a commission of two per cent of the sale price of said property, and describing a part of said property. Admits that the defendant knew the description of its said property. Denies that the complainant did not know the description of defendant's property. This defendant denies that it ever delivered a memorandum of agreement to the complainant, or represented to her that said memorandum contained a description of its said property then owned by it in Grays Harbor and Thurston Counties in connection with its said logging and lumbering operations.

This defendant denies that it made any representations to the complainant, or that the complainant relied thereon. This defendant denies that the

~~complainant procured the Mason County Logging~~ Company to buy the defendant's said property. The defendant alleges the truth to be that the said ~~property so sold to the~~ [15] Mason County Logging Company was by and through other agents and agencies, and that the complainant had nothing whatever to do with the sale of said property to the Mason County Logging Company, and this defendant denies that it ever furnished any memorandum of agreement describing all of the real property *wo*ned by the defendant, or intended to describe all of the real property owned by the defendant, and denies that any memorandum ever furnished to the complainant was untrue, or concerning which there was any misrepresentation, and denies that there was any mistake in any communication or memorandum ever furnished by this defendant to the complainant, and denies that the complainant procured the sale of said property to the Mason County Logging Company, and denies that the complainant was misled in anywise as to any memorandum received from this defendant in connection with its property.

This defendant denies there was any mutual mistake between the defendant and the complainant in connection with the description of its said property, and denies that there was any accident, inadvertence or mistake in leaving out and *and* omitting from said memorandum that portion of its property described in paragraph IV of the bill of complaint contained in Sections 26, 32 and 34, Township 18 North, Range 5 West, WM., and Sections 2, 4, 9,

10, 16, 17 and W.½ NW.¼ of Section 11, Township 17 North, Range 5 West, WM., and denies that there was any omission unknown to the complainant, or discovered by her until after the sale of said property to the Mason County Logging Company. Denies that the complainant procured said purchaser or had anything to do with the sale of said property to the Mason County Logging Company. Denies that the failure of the complainant to discover or ascertain the fact that the said property had been omitted from any memorandum was due entirely to her inadvertence, accident and mistake. [16]

VI.

Denies that there is now justly due and owing to the complainant from the defendant the sum of Fifty Thousand ($50,000.00) Dollars, or any other sum whatsoever. Denies that the complainant has any contract of employment, and denies that the complainant has been deprived, by reason of any mutual mistake or inadvertence, or mistake or inadvertence of the complainant, or on account of any fraud of the defendant, from being able to enforce said contract, and alleges the truth to be that the complainant has no contract with the defendant, and that any alleged contract which the complainant claims to have is void, because of the statute of frauds of the State of Washington providing that all agreements shall be void authorizing or employing an agent to sell real estate for compensation or a commission unless such agreement is in writing

signed by the party to be charged therewith and describing the subject matter of the contract.

VII.

And this defendant, in addition to the foregoing answer, avers that by a certain statute, being Section 5825 of Remington's Compiled Statutes of Washington, 1923, in force and effect at all times herein mentioned, commonly called the statute of frauds, all agreements, contracts and promises authorizing and employing an agent or broker to sell or purchase real estate for compensation or a commission shall be void unless such agreement, contract or promise, or some note or memorandum thereof be in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized. That the said alleged agreement set up in said complainant's bill of complaint, and therein alleged to have been made and entered into by the defendant and the complainant was not in writing and executed pursuant to the said statute, and therefore this defendant insists that the same is void as against this defendant, and that it cannot be affected thereby, and this [17] defendant, for the reasons and under the circumstances aforesaid is advised and insists that this complainant is not entitled to any relief touching the said matters complained of in her bill of complaint.

VIII.

And this defendant for a still further answer to said bill of complaint avers that heretofore in the Superior Court of the State of Washington, in and

for King County, in cause No. 182,091, entitled "R. M. Gaunt, Plaintiff, vs. Vance Lumber Company, a Corporation, Defendant," this complainant instituted an action to recover a commission of two per cent upon a complaint, a copy of which is hereto attached, marked Exhibit "A" and made a part of this answer; that thereafter the defendant filed an answer in said cause, a copy of which is hereto attached, marked Exhibit "B" and made a part of this answer, and that subsequently thereto, on or about the 18th day of December, 1925, said action came on for trial before a court and jury, and thereafter such proceedings were had therein that the Court entered a judgment in said cause dismissing said action, a copy of which judgment is hereto attached, marked Exhibit "C" and made a part of this answer; that the said contract of employment referred to in said judgment is the identical contract of employment which the complainant is attempting to set up in her bill of complaint herein, and is the identical contract of employment which the Court therein declared insufficient; that said judgment in said cause No. 182,091, at all times since its entry on the 22d day of December, 1925, has been and now is in full force and effect and that all of the matters and things alleged and set up in complainant's bill of complaint had been adjudicated and determined adversely to the complainant in a court of competent jurisdiction, and the defendant, for the reasons aforesaid and under the circumstances aforesaid, is advised and insists that the complainant is not entitled to any relief

in this court against the defendant touching the matters complained of in her said bill of complaint. [18]

IX.

And this defendant in addition to the foregoing answer again and still further avers that the complainant has been fully aware at all times from and after the 5th day of July, 1923, of all the facts and circumstances concerning and entering into her alleged contract of employment and of the insufficiency thereof, and this complainant has been guilty of laches in seeking any equitable relief looking to the reformation of said alleged contract of employment, and the complainant has no pursued reasonable diligence if she had any rights to have said alleged contract reformed, in seeking such equitable relief, and the defendant for the reasons aforesaid and under said circumstances is advised and insists that said complainant is not entitled to any relief against the defendant touching the matters complained of in said bill of complaint.

WHEREFORE, defendant prays that this action may be dismissed and that the defendant may go hence without day, and that it recover its costs and disbursements herein.

W. H. ABEL,
POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Defendant.

Due service of the within answer, together with the receipt of a true copy thereof, is hereby admitted this 13th day of October, 1927.

GROSSCUP, MORROW & WALLACE,
Solicitors for Complainant. [19]

EXHIBIT "A."

In the Superior Court of the State of Washington in and for the County of King.

No. 182,091.

R. M. GAUNT,

Plaintiff,

vs.

VANCE LUMBER COMPANY, a Corporation,
Defendant.

COMPLAINT.

Plaintiff complains and for cause of action against the defendant, alleges:

I.

That the defendant at all times herein mentioned was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington with an office and place of business in Seattle, King County, State of Washington.

II.

That at all the times herein mentioned the defendant was the owner of the following described real estate and timber lands, lying, being and situate in the State of Washington, to wit:

Sections 25, 35 and 36, Township 18 North, Range 5 West, W. M.,

Sections 29, 30, 31 and 32; the N.¾ of the E.½, the W.½ of the SW.¼ of Section

20; the W.½ of Section 22; the NE.¼ of Section 28; the SE.¼ of Section 26; the SW.¼ and the SW.½ of the NW.¼; the NE.¼ of the NW.¼; the NW.¼ of the NE.¼, of Section 34, Township 18 North, Range 4 West, W. M.,

Section 8: the NE.¼ of Section 2, and the E.½ and the N.½ of the SW.¼; the S.½ of the NW.¼ of Section 6; Township 17 North, Range 4 West, W. M., [20]

Section 11 and the E.½ and the NW.¼ of Section 12; the SW.¼ of the SW.¼ of Section 15; the E.½ of the E.½ of Section 22; the SW.¼ of the NE.¼ and the NW.¼ of the SE.¼ of Section 21, Township 17 North, Range 5 West, W. M.,

together with the sawmill, railroad, railroad equipment, and all tools and appliances and personal property on said property and used in connection with the operation of the said sawmill in the cutting and manufacture of lumber.

III.

That on or about July 5th, 1923, the said defendant was desirous of selling said real estate and personal property, and entered into a contract in writing with the plaintiff wherein and whereby the defendant employed the plaintiff to secure for the defendant a purchaser for said property and the defendant did agree to sell said property to any purchaser that the plaintiff could find willing to purchase said property for the sum of $3,250,000.00 and to pay the plaintiff a commission of 2% on the said sale price of said property. That there-

after and, to wit, on or about the 7th day of August, 1923, the plaintiff did find and procure a purchaser for said property, to wit, Mason County Logging Company, a corporation, and the said Mason County Logging Company did purchase the property of and from the defendant for the said sum of $3,250,000.00.

That the plaintiff has performed all the conditions of said contract on her part to be performed. That defendant has wholly neglected and refused to pay the plaintiff her said commission on the sale of said property or any part thereof. That there is now justly due and owing the plaintiff from the defendant, the sum of $65,000.00, with interest thereon at the rate of 6% per annum from the said date of sale. [21]

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $65,000.00, with interest thereon at the rate of 6% per annum from the 7th day of August, 1923, until judgment, together with costs of suit.

CHAS. A. WALLACE,
Attorney for Plaintiff.

Office and Postoffice Address: 26th Floor L. C. Smith Bldg., Seattle, Washington.

State of Washington,
County of King,—ss.

R. M. Gaunt, being first duly sworn, on oath deposes and says that she is the plaintiff named in the above-entitled action, that she has read the foregoing complaint, knows the contents thereof, and

that the matters and things therein set forth are true as she verily believes.

R. M. GAUNT.

Subscribed and sworn to before me this 30th day of April, nineteen hundred and twenty-five.

CHAS. A. WALLACE,
Notary Public in and for the State of Washington,
Residing at Tacoma. [22]

EXHIBIT "B."

In the Superior Court of Washington in and for King County.

No. 182,091.

R. M. GAUNT,

Plaintiff,

vs.

VANCE LUMBER COMPANY, a Corporation,
Defendant.

ANSWER.

The defendant specially relying upon its demurrer unto the complaint, and not waiving the same, makes answer unto said complaint as follows:

I.

Denies each and every allegation contained in paragraph II, except, however, it is admitted that on July 5th, 1923, the defendant owned the lands specifically described in said paragraph.

II.

Denies each and every allegation contained in

paragraph III, and denies that the defendant is indebted to the plaintiff in any sum or at all.

For a second defense, the defendant alleges:

I.

That it is a corporation duly organized under the laws of the State of Washington, with its principal place of business in Grays Harbor County, State of Washington; that it has paid its license fee last due unto the State of Washington. [23]

II.

That the alleged contract referred to in the complaint and on which the plaintiff bases this action was not in writing, nor signed by this defendant, nor by any person by it lawfully authorized so to do, nor were the terms of any such alleged agreement in writing nor signed by this defendant, nor by anybody by it authorized, and the said alleged agreement is void under the statute of frauds. That the plaintiff did not perform any such alleged contract or render any services thereunder or furnish a purchaser to the defendant thereunder.

WHEREFORE, having fully answered, the defendant prays the dismissal of plaintiff's action.

W. H. ABEL,
Attorney for Plaintiff.

State of Washington,
County of King,—ss.

H. B. Dollar, being first duly sworn, on oath deposes and says: That he is secretary of Vance Lumber Company, a corporation defendant herein and as such makes this verification, having the au-

thority so to do; that he has read the above and foregoing answer, knows the contents thereof and believes the same to be true.

H. B. DOLLAR.

Subscribed and sworn to before me this 23d day of June, 1925.

AL. von ATYINGEN,
Notary Public in and for the State of Washington, Residing at Seattle. [24]

EXHIBIT "C."

In the Superior Court of the State of Washington in and for King County.

No. 182,091.

R. M. GAUNT,

Plaintiff,

vs.

VANCE LUMBER COMPANY, a Corporation,
Defendant.

JUDGMENT.

This case coming on for trial on the 18th day of December, 1925, and a jury having been sworn to try the case, the plaintiff having offered in evidence the contract of employment, and the Court holding the same insufficient, whereupon the defendant moved that the action be dismissed, and the Court having duly considered the same granted the said motion.

NOW, THEREFORE, in accordance with said premises, IT IS HEREBY ORDERED, AD-

JUDGED AND DECREED that this action be, and the same is hereby dismissed, the defendant to recover its costs and disbursements herein.

To all of which the plaintiff excepts and her exceptions allowed.

Done in open court this 22d day of December, 1925.

MITCHELL GILLIAM,
Judge.

O. K. as to form.

CHAS. A. WALLACE,
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 13, 1927. Ed. M. Lakin, Clerk. By S. M. H. Cook, Deputy. [25]

[Title of Court and Cause.]

EXCERPT FROM RECORD OF TRIAL SHOWING SUBSTITUTION OF EXECUTRIX.

Now, on this 22d day of March, 1928, this cause comes on for trial, Grosscup & Morrow appearing as counsel for the plaintiff and W. H. Abel for the defendant. A motion to substitute the executrix of Ruby M. Gaunt, deceased, is granted.
* * *

Journal No. 2, at page 82. [26]

[Title of Court and Cause.]

DECISION.

5/21/22.

CHAS. A. WALLACE, Esq., J. O. DAVIES, Esq., Solicitors for Complainant.

GROSSCUP, MORROW & WALLACE, of Counsel,

POE, FALKNOR, FALKNOR & EMORY and W. H. ABEL, Esq., Solicitors for Defendant.

NETERER, District Judge.—This is an action in equity for reforming a written contract of agency to sell land, by including certain lands claimed to be omitted, and enforcement of the contract "as and when reformed according to the principles applicable, by granting a money judgment in favor of the complainant."

It is in substance alleged that a written contract was entered into whereby defendant agreed to sell "both real, personal and mixed" property of the defendant in its logging and lumbering business, which were omitted, either intentionally by the defendant or was due to a mutual mistake of the parties.

The omitted lands consisted of the Township of Malone, the millsite and the railroad rights of way, and logged-off lands, the farm and the lands reduced to cultivation.

The contract is claimed to be a plat and a letter dated July 5, 1923, which reads:

"The property consists of the sawmill with a capacity of 140,000 feet per 8-hour day, blacksmith and machine shops, planing mill with necessary dry kilns and dry lumber sheds, two shingle mills with dry kilns. We have just recently completed the installation of one 1,000 K. W. General Electric Co. turbine with necessary motors for supplying power for the above properties; office and store building complete with stock of merchandise; hotel with accommodations for 100 people; 65 cottages for the accommodation of employees with families; pool hall and picture show house. The logging equipment consists of one [27] 100-ton Baldwin rod engine (new), two Heisler geared locomotives, 17 donkey engines with necessary lines, blocks, etc., 2 steam shovels, 11 flat cars, 1 steel moving car, 3 oil tank cars, 42 connected logging trucks, 6 ba*l*ast cars, camp cars for two camp units and about 14 miles of standard gauge railroad. Standing timber which will cut 400 million, about 75 to 80% fir, balance hemlock, spruce and cedar. There is about 500 million feet of standing timber available but not owned by the company. We are enclosing herewith plat showing our holdings together with holdings of other companies in this vicinity."

The plat is unsigned, but contains the name, "Vance Lumber Company," written by another, and while not attached to the letter, was enclosed.

The testimony of the secretary of the company was to the effect that at the time of the conversation with the plaintiff and of the letter, it was not in-

tended to sell any property other than described in the letter.

At the conclusion of the trial the court held that there was no evidence to support plaintiff's contention, and reformation was denied. Defendant moved to dismiss, and this motion was taken under advisement, and briefs from the respective parties invited.

CHAS. A. WALLACE, Esq., J. O. DAVIES, Esq., Solicitors for Complainant;

GROSSCUP, MORROW and WALLACE, of Counsel.

POE, FALKNOR, FALKNOR & EMORY, and W. H. ABEL, Esq., Solicitors for Defendant.

NETERER, District Judge.—It is primer law that the Court may not make a contract for the parties. At the close of the trial the Court held that no evidence was presented warranting reformation. The most that can be said, the letter, with the plat, is the conclusion of the minds of the parties, and basis on which the minds met if they did meet. There was no mutual mistake. If the minds of the parties did not meet upon the letter and the map, there was no meeting of the minds. From the bill of complaint, the minds of the parties never met as to the identity of the property to be sold. The description of the property the court is asked to write into the contract was not included, but purposely excluded—testimony of Dollar, Secretary—and the seller's conclusion to sell was not changed until the time of sale to the Mason Logging Com-

pany, inspired by W. H. Abel, agent, through whom the sale, the testimony shows, was made, and it was the determining factor as the purchaser wanted all of the property and was therefore necessary to consummate the sale. Nor was there any segregation of the price of timber, or of land, or other properties in the letter; nor evidence of value; being indivisible, [28] the contract, if any, if void as to real estate, was void as to all. Cushing vs. Monarch Timber Co., 75 Wash. 678; White vs. Panama L. & S. Co., 129 Wash. 189.

All the property sold is not included in the letter or the map, even though plaintiff did show agency in selling, such act would be obnoxious to the statute; and this is true even though the letter and the map contained internal evidence of unity—which they do not.

An essential element of the memorandum required by the statute to be signed by the parties to be charged is a description of the thing to be sold and of the price to be paid. Crafton vs. Cummings, 99 U. S. 112, a "shingle plant situated in the city of Olympia, Washington," White vs. P. L. & S., 129, Wash. 189, "shingle timber for sale in Clallam, County, Washington, Engleson vs. P. C. S. Co., 74 Wash. 424, "My property including 121 acres of land near Ephrata, etc." Baylor vs. Tolliver, 81 Wash. 257, "my stock ranch located in Secs. 9, 17 and 21, Township 3 South, Range 13 East, Sweetgrass County, Montana," Rogers vs. Lippy, 99 Wash. 312, "my property, the 667-acre hay ranch located near Cataldo, Idaho," Nance vs.

Valentine, 99 Wash. 327,—are held to be insufficient descriptions to satisfy the statute. From any view of approach it appears there was no enforceable contract.

The Supreme Court of Washington for nearly a quarter of a century has uniformly held in construing the statute in issue, that the terms of the contract must appear from the writing itself, and that parol testimony may not be received to supply any deficiency, and in McCrea vs. Ogden, 54 Wash. 521, involving a broker's right to compensation under void contract, said:

> "But the purpose of the law was to remove all doubt, and in doing so no injustice was done the broker, for it was always within his powers to make the contract or memoranda certain in every particular, including the party to be bound, which, notwithstanding the expression in the former opinion to the contrary, we regard as a first essential of the law, which element, if proven in this case, would necessitate a resort to parol testimony."

The plaintiff asserts that the letter of the defendant of August 15, 1923, "as we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us again," or that more property was included, or other price obtained, would still entitle the plaintiff to recover; and cites Duncan vs. Parker, 81 Wash. 340, and Keith vs. Peart, 115 Wash. 552.

In the Duncan case, the authority of the broker to sell was not questioned. He had inaugurated the negotiations but was not permitted to complete them, but were concluded by the owner. In the Keith case, the broker's authority was likewise recognized, and after beginning negotiations and bringing the parties together, the owner carried forward these negotiations, but concluded it at a different price than that given to the agent, and the court held he was under the evidence disclosed, entitled to the commission. The letter of August 15 did not change the contractual status of the parties. [29]

While this Court did receive in the record the oral testimony, and did consider it in concluding upon the facts with relation to the reformation, the law of the state as construed by the highest court, as will be later stated, must control.

The plaintiff contends that while in the federal court oral evidence will be received to reform a contract required to be in writing by the state statute, insists that the Washington courts have likewise followed such rule in Rosenbaum vs. Adams, 63 Wash. 506; Carlson vs. Druse, 9 Wash. 542, and Hazard vs. Warner, 122 Wash. 687.

The Rosenbaum case *as* an action to reform a deed by which the southeast quarter was conveyed when the grantor and the grantee intended the southwest quarter, through mutual mistake, or of the scrivener in preparing the deed.

The Carlson case was an action to reform a deed in which there was a mutual mistake by including

the area in roads on the north and west boundaries of the tract, where it appears that the grantor, owning a 5½ acre tract, agreed to sell 2½ acres and measured it with a tape and set a stake on the east side of the west road, which he stated would be the boundary and which made 2½ acres exclusive of the roads, and later moved the stake 42 feet north and made a deed accordingly, so as to make but 2½ acres including both roads; that the grantor informed the grantee that "one-half of the north road comes with the tract." These cases are clearly not within the statute.

In the Hazard case there was an oral agreement to purchase all the seller's hay, both first and second cuttings, no tonnage given. The Court held the seller entitled to reformation of the written contract of the buyer offering to buy "250 about tons," on the ground that the contract, through mistake, didn't express the intent of the parties, unless the word, "about," be construed to include the entire crop.

Nor is Am. Merchant Marine Ins. Co. vs. Tremaine, 269 Fed. 376, within the statute, wherein the Court referred the written expression of the contract as found in the insurance policy.

The state statute as construed and applied by the highest court of the state, I think is practically uniformly applied in the federal courts.

In Massey vs. Allen, 84 U. S. 354 (17 Wall.), the Court, applying the statute of frauds of Missouri, said: "The statute, being a local one applying only to sales in Missouri, this court will follow

the construction given to it by the highest court of the state."

In Lloyd vs. Fulton, 91 U. S. 487, the Court gave effect in an equity suit in a state where the English statute of frauds touching promises made in consideration of marriage is in force, and held an oral promise of the husband to settle his property on his wife, made before marriage, was void. [30]

In Allen vs. Youngstown, 39 Fed. 353, the Court declined to reform a written contract, and for specific performance, where the contract was void under the statute of Pennsylvania, and said: "Confessedly then, there is here no contract which legally binds the defendant, and if there is no such valid contract at law, upon what principle can the plaintiff be granted equitable relief here sought. Undoubtedly the above equitable statutory provision is as binding on a court of equity as on a court of law."

Richfield vs. Ballou, 114 U. S. 190: "Certainly the general rule is that courts of equity cannot dispense with regulations prescribed by a statute, or supply any circumstance for the want of which the statute has declared the instrument void."

Walker vs. Hafer, 170 Fed. 37 (6 C. C. A.), applying the statute of frauds of Ohio, in a suit for specific performance, the Court held the contract satisfied the statute.

In Robinson vs. Belt, 187 U. S. 43, the Court applied the statute of frauds, and said: "As the Arkansas statutes concerning assignments for the benefit of creditors and the statute of frauds were

extended and put in force in the Indian Territory by the act of Congress above cited, it becomes material to consider the decisions of the Supreme Court of that state with reference to the validity of the provision of an assignment exacting a release by creditors of all their demands against the assignor as a condition of preference."

In Beckwith vs. Clark, 186 Fed. 171 (8 C. C. A.), in applying the Kansas statute of frauds, said: "Rules of property established by the construction of the highest judicial tribune of the state of its Constitution or statute, prevail in the federal courts where no question of right under the Constitution or laws of the nation and no question of general or commercial law is involved."

In De Wolf vs. Rebaud, 1 Peters, 472, Justice Story applied the state rule in New York as to the reception of parol evidence, and said: "What might be our own view on the question, unaffected by any local decision, it is unnecessary to suggest, because the decisions in New York upon the construction of its own statute and the extent of the rules deduced from them, furnish in the present case a clear guide for this court."

In York vs. Washburn, 129 Fed. 565 (8 C. C. A.), a law action to recover money upon a contract void under the statute of frauds, the Court said: "The interpretation of a state statute by the highest court of the state establishes a rule of property, and is within the rule stated."

In Standard B. Co. vs. Curran, 256 Fed. 69 (2 C. C. A.), the Court said: "This court will fol-

low a decision of the New York Court of Appeals construing the statute of the state of New York."

In Ballentine vs. Yung Wing, 146 Fed. 621, a law action upon a contract within the statute of frauds, the Court said: "The state statute attacks the remedy. The *lex fori* governs, and it is such a law as has been declared by Congress to be a rule of decision in the federal courts. These propositions are too elementary to require citations. Under the Connecticut [31] decisions, the statute requires the memorandum of agreement to be complete, definite, and certain in all necessary details, and not some vague writing, which to be of value must be supplemented by conversations or aided by oral testimony to supply defects or omissions. Treating the plaintiff with every liberality, the statute of frauds appears to impede his further progress. The statute is directed at the remedy, and not at the evidence which might support a remedy, if one could be made operative."

In Moses vs. Bank, 149 U. S. 299, a law action involving the statute of frauds of Alabama, the Court said: "It was argued on behalf of the original plaintiff that the validity and effect of the guaranty must be governed by the general commercial law without regard to any statute of Alabama, but there can be no doubt that the statute of frauds, even as applied to commercial instruments, is such a law of the state as has been declared by Congress to be a rule of decision in the courts of the United States."

This Court In re Pac. Electric & Automobile Co., 224 Fed. 220, followed the construction of the state supreme court in applying the conditional sales contract statute.

In Omaha vs. Omaha Water Co., 194 Fed. 246 (8 C. C. A.), in passing upon the validity of a mortgage under the laws of Nebraska, the court said, at 249: "The decision of the supreme court of Nebraska concerning the nature and extent of the estate or rights of mortgagees in mortgaged property, are controlling upon us."

The contract in issue was void under the law of the *lex fori,* and is distinguished from Ackerlind, vs. U. S. 240 U. S. 531; in that case "the contract was not unlawful in the preliminary stages, or even void in a strict sense * * * . " "There was a mistake made by a clerk in not striking out a printed clause from the requisition" which the Bureau of Supplies had notified the contractor was omitted.

To analyze and distinguish all of the cases cited by complainant would unduly extend this opinion.

The plaintiff contends that, the suit in equity having failed, the case should proceed at law on amended pleadings (Sec. 274a, J. C.; Sec. 397, Title 28, U. S. C. A.).

The records show that a previous law action in the state court was dismissed on motion of nonsuit, because the contract was void under the state statute of frauds. This, defendant urges, is *res adjudicata.* This contention is not well founded, since Sec. 410, Rem. C. S., provides that judgment

of nonsuit does not bar another action on the same cause.

Whether the Court shall apply Equity Rule 23 or Sec. 274a, *supra,* must be determined by the present record, the general nature and scope of the case made. The suit is essentially in equity. The prayer of the complaint is for reformation of contract and decree enforcing referred contract by granting money judgment. The complainant failed for want of proof, and the legal question involved fell with the main suit. [32] Sec. 274a has no application and the suit must be determined according to the principles applicable under Equity Rule 23. See Electric Boat Co. vs. Torpedo Boat Co., 215 Fed. 377; Goldschmidt T. Co. vs. Primes Chem. Co., 216 Fed. 382; Wright vs. Barnard, 233 Fed. 329; 1st Saving Bank & Trust Co. vs. Greenleaf, 294 Fed. 467; Manger Laundry Co. vs. Nat. Marking Mach. Co., 252 Fed. 144.

The contract being void under the state statute of frauds, unenforceable at law, and equity determined against the relief prayed, the maxim, "*Aequitas sequitar legem,*" applies; the suit must be dismissed. A formal order may be presented after notice to the other side.

NETERER,

U. S. District Judge.

[Endorsed]: Filed May 21, 1928. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN EQUITY—No. 596.

RUBY M. GAUNT,

Complainant,

vs.

VANCE LUMBER COMPANY, a Corporation,

Defendant.

DECREE.

This cause came on to be heard at this term, and, after the introduction of the evidence, was argued by counsel; and the Court having found that the complainant was not entitled to a reformation of said contract set forth in her bill of complaint, and that said contract was void under the statutes of the State of Washington and unenforceable at law; now, therefore, it is

ORDERED, ADJUDGED AND DECREED that this action be, and the same is hereby, dismissed, and that the defendant recover of and from the complainant its costs and disbursements hereafter to be taxed, to all of which plaintiff excepts and exceptions is noted.

Done in open court this 11 day of June, 1928.

JEREMIAH NETERER,

Judge.

[Endorsed]: Filed Jun. 11, 1928. [34]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Vance Lumber Company and W. H. Abel and A. J. Falknor, Its Attorneys:

Please take notice that Carrie Gaunt, as executrix of the estate of Ruby M. Gaunt, deceased, plaintiff above named, has and does hereby appeal from the final decree entered against her and in favor of the defendant named in the above-entitled court and cause on June 11, 1928, dismissing her complaint, to the Circuit Court of Appeals of the United States for the Ninth Circuit.

B. S. GROSSCUP,
W. C. MORROW,
CHARLES A. WALLACE and
JOHN O. DAVIES.

Service of the foregoing notice of appeals, petition on appeal, order allowing appeal, assignment of errors, citation on appeal and bond on appeal is hereby acknowledged and copy thereof received this 7th day of September, 1928.

——————————,
——————————,

Counsel for Defendant, Vance Lumber Company.

[Endorsed]: Copy of within received Sep. 7, 1928.

POE, FALKNOR, FALKNOR & EMORY,
Attys. for ————.

[Endorsed]: Filed Sep. 7, 1928. [35]

[Title of Court and Cause.]

PETITION FOR AND ORDER ALLOWING APPEAL.

Now comes Carrie Gaunt, executrix of the estate of Ruby M. Gaunt, deceased, complainant in the above-entitled cause, believing herself aggrieved by the decree of the District Court of the United States, entered in this cause on the 11th day of June, 1928, to the extent only that said decree denies to the complainant the right of reformation of the contract sued upon in the bill of complaint, as prayed for in said bill of complaint, and in case the Circuit Court of Appeals shall be of the opinion and shall judge the complainant not entitled to the relief of reformation of the contract sued upon in the bill of complaint, but shall find that the contract sued upon was not within the statute of frauds of the State of Washington, then, and in that case, this appellant prays that the Circuit Court of Appeals determine the sufficiency of the said contract under the statute of frauds in the State of Washington, and that complainant was entitled to have said cause heard upon its merits concerning her right to recover under the allegations of her bill of complaint, and all the evidence in support thereof. [36]

The complainant prays that her appeal may be allowed and citation issued, as provided by the rules of this Honorable Court, and that transcript of the records, proceedings and papers may be duly au-

thenticated and sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

This petitioner further prays that an order be entered fixing the security required to perfect this appeal in such amount as the Court may determine.

B. S. GROSSCUP,
W. C. MORROW,
CHAS. A. WALLACE and
JOHN O. DAVIES,
Solicitors for Complainant.

ALLOWANCE OF APPEAL.

The above petition is granted and the appeal hereby allowed on giving bond conditioned as required by law in the sum of two hundred dollars ($200.00).

Dated this 7 day of September, 1928.

JEREMIAH NETERER,
U. S. District Judge.

[Endorsed]: Filed Sep. 7, 1928. [37]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the complainant in the above-entitled cause by her solicitors and shows to this Honorable Court that the decree in the above-entitled cause made and given on the 11th day of June, 1928, is

erroneous and does not give to the complainant the relief to which she is entitled, in the following particulars, to wit:

I.

The Court committed error in finding that the testimony in said cause did not show and establish fraud in the execution of the contract sued upon in said cause.

II.

The Court was in error in finding that the testimony in said cause did not show mutual mistake in the execution of the contract sued upon in said cause.

III.

The Court err*or*ed in finding that under the testimony in said cause said contract so sued upon in the bill of complaint was within the statutes of frauds of the State of Washington and therefore void and unenforceable.

IV.

The Court err*or*ed after having ruled that the evidence was insufficient to reform the contract on the [38] ground of either fraud or mutual mistake, in refusing to proceed to adjudicate the cause upon the contract as set forth in the bill of complaint and evidence produced at the hearing, and in refusing to determine the right of the parties under said contract.

V.

The Court errored in entering a decree dismissing plaintiff's cause of action.

B. S. GROSSCUP,
W. C. MORROW,
C. A. WALLACE and
JOHN O. DAVIES,
Solicitors for Appellant.

[Endorsed]: Filed Sep. 7, 1928. [39]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Carrie Gaunt, executrix of the estate of Ruby M. Gaunt, deceased, as principal and American Surety Company of New York, as surety, acknowledge ourselves to be jointly indebted to the Vance Lumber Company in the sum of Two Hundred Dollars ($200.00), conditioned that whereas on the 11th day of June, 1928, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in that court wherein Carrie Gaunt, as executrix of the estate of Ruby M. Gaunt, deceased, was substituted as plaintiff therein and the Vance Lumber Company, a corporation, was defendant on the Equity Docket No. 596, a decree was entered against the plaintiff and in favor of the defendant denying plaintiff the right to reform a contract sued upon

in her bill of complaint in the above-entitled action, and dismissing said cause, has appealed from the order and decree so made and entered into, to the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco in the State of California,—

Now, if the said principal shall prosecute her appeal and answer and pay all costs if she fails to make good her appeal then the above obligation to be void; otherwise to remain in full force and effect. [40]

Dated this 7th day of September, 1928.

CARRIE GAUNT,

Executrix of the Estate of Ruby M. Gaunt, Deceased.

By J. O. DAVIES,

CHAS. A. WALLACE,

Solicitors for Appellant.

AMERICAN SURETY COMPANY OF NEW YORK.

By A. E. KRULL,

(A. E. KRULL),

Its Resident Vice-President.

Attest: TOM C. STERNE,

(TOM C. STERNE),

Its Resident Assistant Secretary.

The foregoing bond is hereby approved this 7th day of September, 1928.

JEREMIAH NETERER,

U. S. District Judge.

[Endorsed]: Filed Sep. 7, 1928. [41]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE.

This cause came regularly on for trial before the Honorable Jeremiah Neterer, one of the Judges of said court, on March 22, 1928.

The plaintiff was present, represented by Charles A. Wallace and John O. Davies.

The defendant was present and represented by W. H. Abel and A. J. Falknor.

WHEREUPON the following proceedings were had and evidence taken:

The death of Ruby M. Gaunt being suggested to the Court the Court made an order substituting Carrie Gaunt as executrix of the estate of Ruby M. Gaunt, deceased, for the plaintiff Ruby M. Gaunt.

Mr. WALLACE.—Now, if the Court please, at this time we would like the Court to call a jury in this case. This is an action for reformation of a contract and for recovery of a commission for sale of land, which was performed. The question of whether or not our client sold the lands or was the procuring cause of the sale is a question which is, under the law, triable by a jury, and we should have a jury called for that [42] purpose.

The COURT.—This case was noted and I was advised that it was a court case, and I excused the jury until next Tuesday morning. It seems strange—

Mr. WALLACE.—(Interposing.) Well, your

Honor, we were informed just about two o'clock that the Court had entered into the trial of another case, and for that reason I wasn't here.

The COURT.—It was an action to reform a contract, an equity case, and was treated as an equity case all along, and the jury is excused until next Tuesday morning.

Mr. WALLACE.—I am very sorry, your Honor.

The COURT.—This is an action to reform a written contract of employment, which is clearly equitable, and for a decree enforcing said contract.

Mr. WALLACE.—Yes, and for a judgment, money judgment, upon the contract, if the jury should find that she has performed her contract.

The COURT.—The motion to call a jury is denied so far as the reformation of the contract is concerned.

Mr. WALLACE.—Well, of course, your Honor, we are not asking for a jury for the purpose of reforming the contract. That is not a part of our motion.

The COURT.—Well, we have no jury; it was excused until Tuesday morning. Are the parties ready to proceed?

Mr. WALLACE.—Yes; your Honor.

The COURT.—And the defendant?

Mr. ABLE.—Yes; your Honor.

The COURT.—Proceed.

Mr. WALLACE.—Then it is not necessary to read the pleadings [43] to the Court.

The COURT.—No. Have you copies?

(Testimony of Harry B. Dollar.)

Mr. WALLACE.—We do not seem to have. We were working on the matter in our office, and we gathered up our papers hurriedly.

The COURT.—I just read the pleadings—I mean I read the complaint in full, and I glanced through the answer.

Mr. WALLACE.—Mr. Falknor, did you get the certified copy of the transcript in the Supreme Court?

Mr. FALKNOR.—Yes.

Mr. WALLACE.—May I have it, please.

(Opening statements by counsel.)

(During opening statement by Mr. Able.)

Mr. WALLACE.—Pardon me, Mr. Able—I think counsel is arguing the case. I do not see that this is necessary, all this minute detail.

The COURT.—I am just taking from both of you that we are simply trying to reform a contract here.

Mr. WALLACE.—Yes; that is all.

Mr. ABLE.—Yes. Well, I am about through, anyway.

TESTIMONY OF HARRY B. DOLLAR, FOR PLAINTIFF.

HARRY B. DOLLAR, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

My name is Harry B. Dollar. I reside in Vancouver, British Columbia. In July and August, 1923, I resided at Malone in the State of Washing-

(Testimony of Harry B. Dollar.)

ton, which is in Grays Harbor County. I was secretary of the Vance Lumber Company and also a director of the company, and a stockholder.

The document shown me, Plaintiff's Exhibit No. 1, is a letter I wrote to Miss Gaunt on July 5, 1923. I [44] enclosed a plat with that letter. Plaintiff's Exhibit No. 2 is the plat that was enclosed with the letter.

"The defendant objected to the introduction in evidence of Plaintiff's Exhibit 2, being the alleged plat, for the reason that the identification of the plat is by parol and is in violation of the statute of frauds, and the plat itself is insufficient under the statute of frauds."

The writing on the top of Plaintiff's Exhibit No. 2, in ink, was not put on by me, and the "W. M." was not put on by me. All other writing was put on by me. I put everything on the map that is on it, including the colored sections, except the ink writing.

The document you handed me, Plaintiff's Exhibit No. 3, is a copy of the contract of sale from the Vance Lumber Company to the Mason County Logging Company, made on January 9, 1924.

"The defendant objected to the introduction in evidence of Plaintiff's Exhibit 3, for the reason that no relation is shown between this exhibit and the alleged contract on which the suit is based, and for the reason that the same is unintelligible unless the descriptions are compared with those of the plat, as they manifestly do not coincide or agree."

(Testimony of Harry B. Dollar.)

There was no other paper or document enclosed with the letter of July 5, 1923, except Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2.

Plaintiff's Exhibit No. 5 is a letter I wrote on behalf of the Vance Lumber Company to Miss Gaunt.

Plaintiff's Exhibit No. 6 is an option given by the Vance Lumber Company to the Mason County Logging Company [45] in the latter part of August, 1923, to purchase the holdings of the Vance Lumber Company. It was an option to sell all of the holdings of the Vance Lumber Company and its logging operations around Malone. That is the option referred to in my letter to Miss Gaunt.

When I made up Plaintiff's Exhibit No. 2 and sent it along with the letter I did not describe on the face thereof in color all of the land belonging to the Vance Lumber Company.

Plaintiff's Exhibit No. 7, of date of August 29, 1923, is a letter to Miss Gaunt by the Vance Lumber Company and signed by me.

The defendant objected to the letter as wholly incompetent, that it bore no relation to the matter set forth in the letter of July 5th, and evidently pertained to a distinct prospective sale of the property to someone other than the Mason County Logging Company.

Plaintiff's Exhibit No. 8 is a copy of a letter that I received from Miss Gaunt. I received the original about the date it bears.

(Testimony of Harry B. Dollar.)

Plaintiff's Exhibit No. 9 is a copy of a letter that I received from Miss Gaunt on or about August 29, 1923.

Plaintiff's Exhibit No. 10 is a copy of a letter the original of which I received from Miss Gaunt at about the date it bears.

The option given, Plaintiff's Exhibit No. 6, was thereafter extended and was still in force and effect by extension up to and including the date of the making of the sale and the signing of the contract of sale Plaintiff's [46] Exhibit No. 3.

I never answered Miss Gaunt's letter, Plaintiff's Exhibit No. 9. I received it a day or two after it was written.

Plaintiff's Exhibit No. 11 is a letter from the Vance Lumber Company to Miss Gaunt signed by me and dated September 3, 1923.

Plaintiff's Exhibit No. 12 is a letter from the Vance Lumber Company, signed by me, to Miss Gaunt, dated July 11, 1923.

The reason I did not describe in the plat, Plaintiff's Exhibit No. 2, all of the lands belonging to the Vance Lumber Company according to the letter which I wrote enclosing it, was that I did not intend to sell all.

Q. Did you intend at the time to sell all of the property that the Vance Lumber Company owned and held, both real and personal— A. No.

Q. Wait a minute—in connection with its logging operations at and near Malone, Washington?

A. No.

(Testimony of Harry B. Dollar.)

Q. What properties did you intend to exclude from that sale? A. All the logged-off lands.

When the option of August 28 was given we included the logged-off lands.

The logged-off lands were included in the option of sale because Mason County insisted on including them.

I did not consult Miss Gaunt about taking a less price for the property than that which I had offered in [47] my letter to her.

When I wrote the letter to Miss Gaunt of date of July 5, 1923, I intended to leave out the logged-off lands belonging to the Vance Lumber Company. The reason I did not say to her in that letter that I was leaving them out, was that I did not consider it necessary.

Plaintiff's Exhibit No. 13 is a copy of a letter from Miss Gaunt to myself, of date of December 17, 1923, the original of which I received about that date. Malone is about seventy-five miles from Tacoma and ordinarily a letter mailed from Tacoma would reach my office in Malone the next day.

Cross-examination.

I was associated with the Vance Lumber Company sixteen years, during and immediately preceding the time of this option. I severed my relations with the Vance Lumber Company in 1927.

There were three trustees, myself and Mr. and Mrs. Vance.

In my letter of August 15, 1923, I mentioned

(Testimony of Harry B. Dollar.)
the fact that we were giving an option. It was an option to the Mason County Logging Company.

The Vance Lumber Company had been negotiating with the Mason County Logging Company, with reference to the purchase, for about a year and a half Mr. Able had had this up with the Vance Lumber Company about a year and a half before the option was given. Mr. Able had been seen many times in connection with the giving of this option, during the year and a half. Miss Gaunt had nothing whatever to do with the securing of the option which was given in [48] August to the Mason County Logging Company.

Miss Gaunt wrote a letter. I have forgotten the exact date, that she would come on that date. She was alone when she arrived. She told me that she had come to look at the property and that there was a party representing some eastern people would be there shortly after she arrived. This party was Mr. Wilson. He was staying at Aberdeen at the time. Mr. Wilson came there the same day Miss Gaunt was there.

Miss Gaunt represented that Mr. Wilson was representing an eastern company that was interested in the purchase of this timber. Mr. Wilson led us to believe that he was representing an eastern firm. He made no objection to Miss Gaunt's statement as to his representation that he was acting for an eastern firm in the purchase of this property. We did not know that our property had been offered at Aberdeen until we learned of it through

(Testimony of Harry B. Dollar.)
Anderson-Middleton. At the time that we received Miss Gaunt's letter, where she indicated she had sent the plat to Mr. Reed, we had already been negotiating for the sale of the timber to the Mason County Logging Company for about a year and a half. These negotiations with the Mason County Logging Company were active during the months of May, June, July and August, 1923. Miss Gaunt did not find the Mason County Logging Company as a purchaser. She at no time ever mentioned to us in any way the Mason County Logging Company. We never saw her but the one time prior to the giving of the option. That was at the time when she and Mr. Wilson came to Malone and discussed the sale to an eastern buyer. After the execution of the option with the Mason County Logging Company, negotiations continued [49] until January 9, 1924. The timber was cruised. Neither Miss Gaunt nor Mr. Wilson ever came and went over the land that was being sold. Neither Mr. Wilson nor Miss Gaunt at any time before the execution of the option ever mentioned to us, or the Vance Lumber Company, the Mason County Logging Company as a purchaser. The negotiations for the giving of the option to the Mason County Logging Company had been carried on through Mr. Abel. The active head of the Mason County Logging Company was Mr. Thomas Bordeaux.

Mr. Wilson led me to believe he was representing an eastern firm.

(Testimony of Harry B. Dollar.)

Defendant's Exhibit "A-1" is a letter I received from Miss Gaunt.

Defendant's Exhibit "A-2" is a letter I received from Miss Gaunt.

At the time I wrote Miss Gaunt the letter, in August, to the effect "Do nothing further," I was concluding an option with the Mason County Logging Company and was desiring to withdraw the sale of the property entirely from the market.

Prior to the giving of the option I had seen Miss Gaunt just once. That was at the time she and Mr. Wilson came to Malone. There was nothing said to me by Mr. Wilson at that time about eastern buyers wanting the logged-off lands.

The sale to the Mason County Logging Company was finally consummated on January 9, 1924.

TESTIMONY OF ISAAC A. WILSON, FOR PLAINTIFF.

ISAAC A. WILSON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

I am Isaac A. Wilson. I reside in Seattle. I knew Ruby M. [50] Gaunt in her lifetime. I know Harry B. Dollar.

I saw Miss Gaunt and Mr. Dollar on May 12, 1923, in the office of the Vance Lumber Company at Malone, Washington. My purpose in going there was to get a contract to sell their timber and equip-

(Testimony of Isaac A. Wilson.)

ment, logging equipment, mill, logged-off lands, all their holdings. That is the Vance Lumber Company timber.

At that time I told Mr. Dollar that I had eastern prospective buyers and also explained to Mr. Dollar that I had prospective western buyers.

At that time Mr. Dollar explained that they wanted to sell all their holdings, logged-off lands, mill, townsite, timber, etc.

At that time Miss Gaunt had a plat with her at his office. Plaintiff's Exhibit No. 2 is the plat she took to Malone with her. The ink writing on this plat is my own writing, in asking Mr. Dollar to describe the different timbers held by different companies adjoining their timber.

The purpose was when I would show their timber to people I could explain there was other timber adjoining to be had.

I put the ink writing on this plat, everything that is in ink, on it before it was delivered to Mr. Dollar at that time. I did that at Mr. Vance's office at Malone. That was before it was filled out. Before the coloring was put on it. This writing was on there at the time it was talked over with Mr. Dollar.

I saw the plat after it came back to Miss Gaunt. I did no writing on it after it came back to Miss Gaunt. I saw it shortly after she got it. It is the same [51] condition now that it was the first time I saw it after she had received it.

(Testimony of Isaac A. Wilson.)

Mr. Dollar at that time said that they wanted to sell everything, including the logged-off lands. He said they were to sell all of their holdings at Malone, State of Washington.

I asked Mr. Dollar for a plat and a legal description showing their holdings and also the adjoining timber and he agreed to it. He agreed at that time to give us a legal description of all their lands, all their holdings including logged-off lands and timber.

He showed us the mill, the machine-shop, and the like of that.

He said that on account of Mr. Vance's illness they wanted to dispose of their holdings and retire from business. He also showed us the theatre and I think a little store and the hotel, and he explained that there were about fifty or sixty cottages, something like that. He, at that time, enumerated the logging equipment which he had. He explained to us about how much logging equipment there was, and then finally furnished a list showing exactly what there was.

Cross-examination.

I am interested in the collection of the commission in this case. I get ten per cent.

(Defendant's Exhibit "A-3" admitted in evidence.)

At the time Miss Gaunt and I had the conversation with Mr. Dollar there was nothing said about a farm and I knew nothing about a farm being a

(Testimony of Isaac A. Wilson.)

part of the property. I did not know that the Vance Lumber Company owned [52] a farm right there by Malone. It was just the logged-off land, the timber and the equipment. He did not explain anything about some of the land being reduced to cultivation. Nothing was said about the Garden Tracts. I did not know how much logged-off land there was.

We were there one or two hours.

At that time Mr. Dollar explained that Mr. Vance was sick and that Mr. Vance had been in the hospital for some time.

I just had prospective buyers at that time.

I was not representing any one particular eastern buyer, and at the time that she said in one of her letters that she had a real buyer, it was only a prospect.

(Plaintiff's Exhibit No. 14 received in evidence, being a letter of date of August 27, 1923, referring to the option, Plaintiff's Exhibit No. 6.)

Mr. WALLACE.—That is all, your Honor.

The COURT.—The plaintiff rests.

Mr. FALKNOR.—If the Court please, Mr. Abel tells me that before I came in there was some suggestion made between Court and counsel as to the question of the reformation of the contract. Now, it is my understanding that courts of equity when they take jurisdiction of a case take jurisdiction for all purposes.

The COURT.—Yes.

Mr. FALKNOR.—And I assume that when your Honor takes jurisdiction of this case for reformation your Honor will retain jurisdiction until the case is disposed of under the issues of the pleadings, and if that is the situation we will go ahead and make our proof. [53]

The COURT.—The law used to be that before a person could sue upon a contract in law he had to enter a court of equity and correct, rectify and reform the contract, and then bring a new action on the law side upon that contract, but now they can have the equitable relief and the legal relief in the same action.

Mr. FALKNOR.—Yes. In this suit, your Honor, they sue for the two things, they sue for the reformation and the full relief.

The COURT.—I understood yesterday that you were simply proceeding to see whether this contract should be reformed.

Mr. FALKNOR.—No.

The COURT.—That is all I want to dispose of now.

Mr. ABEL.—To reform and enforce the contract?

The COURT.—Just to reform.

Mr. WALLACE.—The other issue is not being tried by the Court at this time, and we haven't introduced any evidence.

Mr. FALKNOR.—My recollection is that this complaint seeks a judgment of fifty thousand dollars.

Mr. WALLACE.—That is true, Mr. Falknor.

Mr. FALKNOR.—That is the point I am making. The issues have been made up on the two points, namely, first, reformation, and then after the reformation enforcement of the contract in this particular action.

The COURT.—Well, that is all we will do now. This is really a bill in equity to reform the contract and to enforce it.

Mr. WALLACE.—Yes.

The COURT.—We will proceed and see whether the contract [54] ought to be reformed, unless the parties want to submit the whole matter.

Mr. WALLACE.—I want a jury trial on the question of whether or not my client was the procuring cause of this sale.

Mr. FALKNOR.—That is the point, your Honor. We are here to try this case according to the issues made by the pleadings. They having come in here and sought in this action a reformation and enforcement of the contract they are not now in a position to come in and say they want to try it piecemeal. Is it their idea in this same action to ask reformation and then afterwards in this same action to submit the case to a jury?

Mr. WALLACE.—Yes.

(Argument and discussion.)

The COURT.—I will determine this upon this reformation feature now.

Mr. FALKNOR.—We will go ahead then and make our proof on the merits as well.

The COURT.—Well, you can if you want to, but you do not need to.

Mr. ABEL.—Your Honor will recall that the other side has gone beyond the reformation.

The COURT.—I know, there is some evidence that went beyond it, explaining the other, and I am willing you may do the same thing.

TESTIMONY OF J. A. VANCE, FOR DEFENDANT.

J. A. VANCE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

My name is J. A. Vance. I am president of Vance Lumber Company and I and my wife are the principal owners of it. [55]

Mr. Dollar at this time has no interest in the company.

I met Miss Ruby M. Gaunt before July 5, 1923, in the office here in Seattle, That was about June 16, 1923. I fix the date as about the time of Defendant's Exhibit "A-4."

I met her that one time only.

At the time Miss Gaunt and Mr. Wilson met Mr. Dollar at Malone Mr. Dollar was authorized to do general business for the company. Mr. Dollar at that time was not particularly authorized to make any deal with Ruby M. Gaunt.

(Testimony of J. A. Vance.)

On July 5, 1923, there was no intention of the Vance Lumber Company selling all of its property of every kind wherever situated.

The agreement, or whatever it was that was sent to her, included all of the property that we figured on selling at that time. It did not include the farm; it did not include the logged-off lands. Later, when we made the sale to the Mason County Logging Company, we included those. Vance Lumber Company had a lumber yard at Elma, which is about five miles from Malone. The Elma yard was first offered for sale January 7, 1924, I think. It was finally put in the Mason County Logging Company deal in order to make the deal.

There were some Garden Tracts there which were finally included in the Mason County Logging Company sale. They are not described on this plat. Roughly speaking there were about ten or twelve hundred acres logged-off land.

Cross-examination.

There was some logged-off land in sections 2 and 4, township 17, range 5; there was some logged-off land [56] in township 18, five and 32; some in 26, 18 and 5. Our railroad ran into that section at that time. That is all logged-off.

We own the timber on section 36, in eighteen, five. We also own twenty-five, in eighteen, five. We did not own the land in thirty-five, in eighteen, five. We owned the land in thirty, in eighteen, four. That was not logged-off. There was some

(Testimony of J. A. Vance.)

logged-off in section 31, in eighteen north of range four.

Section 11, in seventeen, five was not logged-off.

We owned three-quarters of section 12, township 17 north of range 5.

We did not describe on Plaintiff's Exhibit No. 2 all of the land that the Vance Lumber Company owned. It was not our intention to sell the logged-off land.

I wrote that letter, Plaintiff's Exhibit No. 15, to Miss Gaunt. At the time Mr. Dollar sent over the letter and plat Mr. Dollar and I had talked it over. I do not remember exactly whether I told him to give her this plat and send this letter to her or not.

I do not remember the exact words I said now.

I knew at that time that she was after a contract for the sale of all our timber and our mill and everything we owned over there, and I talked to Mr. Dollar about it and then as a result of that talk it is a fact that Mr. Dollar wrote that letter to her on July 5, 1923. And at that time I intended to withhold a part of these lands. I intended to hold the logged-off lands, the farm land, the Garden Tracts and the Elma Yard. [57]

The letter of May 7, 1921, was in response to another letter of date of April 30, 1921—Plaintiff's Exhibit No. 16.

TESTIMONY OF W. H. ABEL, FOR DEFENDANT.

W. H. ABEL, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination.

My name is W. H. Abel. I reside at Montesano, Washington. I have lived there since 1892. I was connected with the sale of the lands of the Vance Lumber Company to the Mason County Logging Company.

I was connected with the sale of the lands from February, 1922, up to the time the sale was finally closed, as attorney for each party.

I was intimately associated with the Vance Lumber Company. I had been their attorney, perhaps always. I had sat in on their original purchase when they bought their millsite, when they started up at Malone, and at all times since then.

I was familiar with their plans with reference to the sale.

I began negotiations for the sale of these properties to the Mason County Logging Company on February 7, 1922. On that date, I wrote a letter to Mr. Bordeaux about giving an option.

Q. Now, Mr. Abel, as briefly as you can, go ahead and relate to the Court the evidence within your knowledge, particularly the evidence bearing upon the lands that they contemplated selling in

(Testimony of W. H. Abel.)
July, 1923, and the inclusions of other and additional lands later on.

Mr. WALLACE.—If the Court please, it seems to me this goes [58] entirely to the question of the procuring cause, and if we are to be permitted to have a jury hear this it ought not to have to be repeated again. It is not pertinent to the issue as to whether or not the contract shall be reformed.

The COURT.—I think, in the first place, the Court must determine whether there is a contract before it can be reformed. I am not going to sit here simply as a bump on a log to see if something shall be done for which there is no basis. The first thing I want to know is whether there is a contract, and then whether it is to be reformed. I am not going to sit here and do an idle thing.

On June 11, 1923, and June 12, 1923, I was in Seattle with Mrs. Abel, where we attended a wedding, and I had a day or two on my hands and I visited Mr. Bordeaux.

A few days later, following that up, I wrote to Mr. Bordeaux, on June 20th, 1923. The letter is attached to his deposition. On June 21, 1923, I received a letter from him on that subject saying that he would be in Bordeaux on the following Wednesday, which would be June 27th. That letter is attached to his deposition. This related to the sale of these properties.

On June 27th, with my son, I went to Bordeaux, my secretary, I think, first having telephoned, and I spent several hours with him. We had the plats,

(Testimony of W. H. Abel.)

the railroad map of the company, the timber map of the company, the timber map of Grays Harbor County, the logged-off land map of Grays Harbor County, the taxes owing map of the county, and we discussed the whole matter with him.

On June 29th, 1923, he and Russell Bordeaux [59] came to my office. This was for the purpose of closing the purchase of the section of land from Anderson & Middleton Timber Company. I use this incident to fix the date. At that time I had another talk with Mr. Bordeaux about getting an option on these Vance properties, and that was followed up later by a letter from me on July 17th, which is contained in the deposition of Mr. Bordeaux, in which I told him what properties were for sale by the Vance Lumber Company. This letter follows:

July 17th, 1923.

Thomas Bordeaux,
1215 Alaska Bldg.,
Seattle, Washington.

My Dear Mr. Bordeaux:

I had a talk with Harry Dollar, of Vance Lumber Company, and after he had talked matters over with Mr. Vance, said they were holding the property at $3,250,000. He says that same included the following:

Saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns.

(Testimony of W. H. Abel.)
Newly completed installation of 1000 K. W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodation for 100 people. 65 cottages for the accommodation of employees with families, pool hall and picture show house.

The logging equipment consists of one 100-ton Baldwin rod engine (new), two Heisler geared locomotives, 17 donkey engines with necessary lines, blocks, etc., 2 steam shovels, 11 flat cars, 1 steel moving car, 3 oil tank cars, 42 connected logging trucks, 6 balast cars, camp cars for two camp units and about 14 miles of standard gauge railroad. Standing timber which will cut four hundred million, about 75 to 80% fir, balance hemlock, spruce and cedar.

At this price he will give terms.

Yours truly,

W. H. ABEL.

P. S.—I am informed there is about 500 million feet of timber tributary to the Vance Lumber Co. operation not in hands of operators.—W. H. A. [60]

The logged-off lands were not then for sale and the yard at Elma, which is real estate, was not for sale; the garden tracts, which were improved land, formerly logged-off land, were not for sale, up on the hill from Malone; nor was the farm.

Q. Those are the properties that they are seeking to include in this contract?

(Testimony of W. H. Abel.)

A. Yes. None of those were for sale by the company at that time. Part of them, however, were put in the option to the Mason County Logging Company on the insistence of Mr. Bordeaux that if he was going to buy he had better buy those too. But still others of the properties were only put in three days before the sale was closed, for the purpose of making the sale to the Mason County Logging Company.

Q. When you began your active negotiations in June, 1923, for the sale to Mr. Bordeaux, were there any properties for sale other than those that were referred to in this letter of July 5?

A. That was the operating properties, including the mill and millsite, which is not specified, and not described upon the plat which is in evidence at all. There is no description whatever of the millsite, which is the most valuable land of all.

Q. That was part of the property that was to be sold? A. Yes.

Q. And then there were some buildings adjoining for the occupancy of the employees?

A. Yes.

Q. Is that land described on this plat? [61]

A. Not at all. There were some sixty-two houses, I believe, besides the store buildings and theatre.

Q. Those lands were entirely omitted?

A. Yes.

Q. From this plat?

(Testimony of W. H. Abel.)

A. Yes; no description in the plat or otherwise in any writing whatever.

The logged-off lands were included in the option to Mason County Logging Company. I drew that option myself and submitted the form to Vance Lumber Company.

It was agreed to include that following the letter of July 17, 1923. The exact date I cannot say offhand, but it was subsequent to that date.

There are some farms on logged-off lands. Some of them are cleared. Logged-off lands have no relation to the logging and lumber operations whatever.

Q. Have you any idea about how extensive those logged-off lands were?

A. Well, I had thought that there were nearly three sections of them.

Then the Elma yard was ultimately included in the sale. That was included the Saturday night before the deal was closed. The deal was closed on Tuesday.

When I began active negotiations in June, 1923, for the sale to Mr. Bordeaux of the Vance Properties, there were operating properties, including the mill and millsite, which is not specified and not described upon the plat which is in evidence, that were for sale. There is no description whatever of the millsite, which is the most valuable land of all, which was for sale. Then there were some [62] buildings adjoining for the occupancy of the employees, some sixty-two houses besides

(Testimony of W. H. Abel.)

the store buildings and theatre. These were for sale, and these lands are entirely omitted from the plat in evidence.

The logged-off lands were included in the option to the Mason County Logging Company. That was following the letter of July 17, 1923. These logged-off lands are capable of being made into valuable farm land. They have no relation to the logging and lumbering operations, and the sale of the timber and the mill would not require in any wise the acquiring of these logged-off lands. There are about three sections of them.

The Elma yard was also included in the sale. This was located on land owned by the Vance Lumber Company. The Mason County Logging Company acquired these lands through me, and I received the fee for putting the deal through.

That while I know Mr. Reed well—he lives at Shelton—I personally know that he is not active in the management of the Mason County Logging Company. He had nothing to do with this deal until the Saturday before the deal was closed, when we were in the closing stages. The negotiations were carried on entirely with Thomas Bordeaux and his sons and Joseph Bordeaux, now deceased. They were the active operators of the Mason County Logging Company. Thomas Bordeaux was the president. I do not know what official position other than trustee, Joseph Bordeaux, deceased, held, but the young men were very active.

(Testimony of W. H. Abel.)
Ray Bordeaux and Russell Bordeaux were the active men in managing the company. [63]

Cross-examination.

The first letter was February 7, 1922, that I found bearing upon the deal. I doubtless had previous talks with Mr. Bordeaux about acquiring the Vance holdings.

At that time, the Vance Lumber Company was holding the property around two million dollars, But as I recollect it, after that the Vance Lumber Company purchased from the Hewitt Land Company, in November, 1922, some property for $450,000, and also some property from the Milwaukee. I am not sure whether the purchase from the Milwaukee was before February 7, 1922, or not.

I got a letter from Mr. Bordeaux, being the letter referred to of February 16th, attached to his deposition. When I wrote my letter of March 23, 1922, I had a very general list of his assets, the estimated valuation. While there was no communication between March 29, 1922, and the following June, I met Mr. Bordeaux nearly every time I came to the city, and on June 11 and 12, 1923, we discussed this very thing—the purchase of the Vance Lumber Company holdings and the rounding out of the timber at the head of Porter Creek over to Perry Creek.

While there were no letters between June 21, 1923, and July 17, 1923, during that period we had

(Testimony of C. Ray Bordeaux.)
the meeting of June 26th at Bordeaux and we had the meeting at my office on June 9th.

TESTIMONY OF C. RAY BORDEAUX, FOR DEFENDANT.

Direct Examination.

My name is C. Ray Bordeaux. I have been the secretary-treasurer and manager of the Mason County Logging Company since 1922, or thereabouts, and was manager during all of 1923, and during the time the Vance Lumber Company [64] sale was made. There were several properties which were purchased which were not originally offered and which we had not intended to purchase, such as some of the logged-off lands, the Garden Tracts, a farm, and the Elma yard. These were included as the negotiations progressed.

The matter was first submitted to me, about buying these properties, something like a year and a half before we closed the deal. We never heard of Miss Ruby M. Gaunt in connection with finding the Mason County Logging Company as a buyer of this property, and never met the lady.

Mark E. Reed was not active in connection with the management of the Mason County Logging Company. He was running another company. While he was a director of the Mason County Logging Company, he was never called in except when it came to a matter of final negotiation. He was

(Testimony of C. Ray Bordeaux.)
operating the Stimson Logging Company, a good many miles away.

Cross-examination.

When the plat came in from Mr. Reed, we were already dealing with Mr. Abel, and no attention was given to it as it furnished no information that we did not already have. We had the information from the Vance Lumber Company a long time before the receipt of the plat, as to their being willing to sell their properties. We had talked to Mr. Abel a year and a half or two years previous to that time, and he told us he would keep us in touch with the situation when the opportunity developed.

TESTIMONY OF W. D. ABEL, FOR DEFENDANT.

Direct Examination.

My name is W. D. Abel. W. H. Abel is my father. Some time in June, 1923, I went with my father to [65] the town of Bordeaux. He talked over at that time with Mr. Thomas Bordeaux concerning the sale of the Vance properties, in connection with which he had been working with them for some time. He showed to Mr. Bordeaux maps and plats, and they went over the topography, showing the location of the Vance properties. We were there from noon until about three o'clock in the afternoon.

(Defendant's Exhibit "A-5" admitted in evidence.)

The deposition of Thomas Bordeaux with the attached exhibits was offered and admitted in evidence. Marked Exhibit ———.

Mr. FALKNOR.—The defendant at this time, your Honor, asks the Court to deny reformation and to dismiss this action for the following reasons: First, there is no contract shown that meets the requirements of the statute of frauds; that the contract pleaded admittedly is insufficient to meet the statute of frauds, and under the decisions of the Supreme Court of the State of Washington such a contract is not subject to reformation.

The COURT.—I am at present inclined to the opinion that the entire issue in this case should have been disposed of upon this trial. However, upon the issue that is to be determined I am convinced in my own mind that if the warranty that is alleged is in this case it would prevent the Court from reformation.

We have here a lapse of four and a half years before this action was commenced. Prior to this action there was an action prosecuted in the state court, something over a year prior to the institution of this action. [66]

There is no clear and convincing evidence before the Court that there was any fraud committed when the letter of July 5, 1923, and the plat were sent by the secretary of the defendant company to the plaintiff. There is no evidence before the Court

which would lead the conscience of the Court to conclude mistake. All of the evidence before the Court is that it was not the intention to dispose of the logged-off lands. It was so testified to by Dollar, the secretary, by Vance, the president, by Abel, who had represented the company and who negotiated this sale, and in the inception of these negotiations the logged-off lands were not included, as well as some of the other property. And the logged-off lands and this other property was only included finally about three days prior to the consummation of the contract of sale. So that the letter of July 5th and the colored plat that was enclosed would seem to me to expose at least the condition of the mind of Dollar, the secretary, at the time of its transmission.

There is nothing before the Court prior to this date upon which to predicate any sort of an agreement. The conversation with the plaintiff and Dollar was not a contract, it could not have been enforced. The substance of this contract was within the statute of frauds of the state, and the first step to take it out of the statute of frauds was the letter of July 5th and the colored map, and from the date of the forwarding of this map until the filing of this case no step had been taken for reformation, or any charge made, as far as the Court knows, of any mistake.

Again, the Court cannot now make a contract for these parties. It would be to defeat the very purpose [67] of the statute of frauds of this state, and the laws of this state control the parties as to

this suit and limit and define their interest in the matter in issue. The petition for reformation will therefore be denied.

Upon the other phase of the case, the motion of the defendant to dismiss the action—

Mr. WALLACE.—(Interposing.) I want to be heard just a second on that.

The COURT.—(Continuing.) The Court must at this time deny that motion. It would be error, I am satisfied. There is such a serious question in my mind with relation to that motion to dismiss that I wish that you gentlemen would brief that proposition, and I will reserve ruling on that, as to whether or not the Court under the evidence in this case should dismiss the action. As presently advised I am inclined against it, but I can see many reasons why that should be done.

Mr. FALKNOR.—Would your Honor allow us fifteen days in which to submit a brief?

The COURT.—Yes; I will give you as much time as you want. I would like to have the question briefed because if the Court ought to dismiss it there is no use placing either the parties *of* the Court to the time and expense.

It was stipulated by counsel in open court that Carrie Gaunt, a witness who was present in court, if called to the stand would testify that the plaintiff was at the time of the commencement of this action and at all other times since up to the time of her death, was a resident and citizen of Multnomah County, State of Oregon, residing in Portland, Oregon. [68]

Plaintiff presents the above and foregoing, together with the amendments proposed by the defendant and allowed by the Court, as a statement of the evidence introduced at the trial of the above-entitled cause upon the question of plaintiff's right to reform the contract set forth in her complaint and shown by the evidence, and asks that the same be settled and allowed by the Court as true and correct, preserving her objections and exceptions to the amendments proposed by the defendant and allowed by the Court.

CHARLES A. WALLACE,
JOHN O. DAVIES,
Solicitors for Plaintiff.

The above and foregoing statement of the evidence in the above-entitled said cause is hereby settled and allowed as full, true and correct.

Dated this 8th day of November, 1928.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Copy of within received Nov. 6, 1926.
POE, FALKNOR, FALKNOR & EMORY,
Attys. for ————.

[Endorsed]: Filed Nov. 7, 1928. [69]

PLAINTIFF'S EXHIBIT No. 1.

No. 596.

VANCE LUMBER COMPANY

Malone, Washington,

July 5, 1923.

Miss R. M. Gaunt,
Tacoma, Wash.

Dear Madam:—

Referring to our former correspondence regarding a description and price on our holdings we beg to submit the following.

The property consists of saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. We have just recently completed the instalation of a 1000 K. W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accomodations for 100 people, 65 cottages for the accomodation of employees with families, pool hall and picture show house.

The logging equipment consists of one 100 ton Baldwin rod engine (new), two Heisler geared locomotives, 17 donkey engines with necessary lines, blocks etc., 2 steam shovels, 11 flat cars, 1 steel moving car, 3 oil tank cars, 42 connected logging trucks 6 balast cars, camp cars for two camp units and about 14 miles of standard guage railroad.

Standing timber which will cut 400 million, about 75 to 80% Fir, balance Hemlock, Spruce and Cedar. There is also about 500 million feet of standing timber available but not owned by the company.

We are holding this property for $3,250,000.00 with commission to you of 2% and will sell on terms of one third cash and $7.50 per thousand feet for all timber cut from our lands and $2.50 per thousand feet for all timber cut from other lands with a minimum payment of $500,000.00 per year, interest on deferred payments at 5%.

We are enclosing herewith plat showing our holdings together with holdings of other companies in this vicinity.

Trusting that this will supply you with the desired information, we are.

Yours very truly,
VANCE LUMBER COMPANY,
By H. B. DOLLAR. [70]

PLAINTIFF'S EXHIBIT No. 3.

KNOW ALL MEN BY THESE PRESENTS: That VANCE LUMBER COMPANY, a corporation duly organized under the laws of the State of Washington, hereinafter called the vendor, and MASON COUNTY LOGGING COMPANY, a corporation duly organized under the laws of the State of Washington, and having its principal place of business in Grays Harbor County, State of Washington, hereinafter called the vendee, agree as follows: to-wit:

FIRST. The vendor agrees to sell, transfer, convey and assign to the vendee, and the vendee agrees to buy from the vendor, all and several the real estate, personal property, and mixed property hereinafter described, at the price and upon the following conditions, to-wit:

(A) The Southeast Quarter of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter and Lots Five and Six, all in Section Six, Township Seventeen North, Range Four West, W. M.

The East Half of Section Six; North Half and the Southwest Quarter of Section Eight, all in Township Seventeen North, Range Four West, W. M.

The Southeast Quarter of Section Eight, Township Seventeen North, Range Four West, W. M.

Lots One and Two, Section Two, Township Seventeen North, Range Five West, W. M.

Lots One, Two, Three and Four of Section Four, Township Seventeen North, Range Five West, W. M., (excepting the strip reserved by August Hanny commencing at the Southeast Corner of Lot One, thence North forty rods; thence West eight rods; thence South forty rods; thence East eight rods to the place of beginning).

Southeast Quarter of Section Nine, Township Seventeen North, Range Five West, W. M.

The South Half of Section Ten, Township Seventeen North, Range Five West, W. M., excepting and reserving a tract known as Tract No. One of Garden Tracts,—

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to Sections 9, 10, 15 and 16 T 17 N. R. 5 W. Wm; thence north a distance of 302.8 feet; thence N 55°–33′ E a distance of 450 feet; thence S 34°–27′ E a distance of 499 feet to a point which is 50 feet at right angles to the center line of the Vance Lumber Co's railroad track; thence S 75°–50′ W parallel to and 50 feet distant from the center line of aforesaid track to the south line of Section 10; thence westerly along said section line 141 feet to place of beginning. Which tract #1 contains 4.98 acres, more or less.

excepting and reserving also Tract No. Two of Garden Tracts,

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to the sections 9, 10, 15 and 16, T 17 N. R. 5 W WM; thence North a distance of 302.8 feet; thence N 55°–33′ E a distance of 450 feet which point is the point of beginning of tract #2; thence N 55°–33′ E a distance of 400 feet; thence S 34°–27′ E a

distance of 635 feet to a point which is 50 feet at right angles from the center line of the Vance Lumber Co's railroad track; thence [71] southwesterly along a line which is parallel to and 50 feet distant from the aforesaid track to the northerly line of tract #1; thence N 34°–27′ W along northerly line of tract #1 a distance of 499 feet to place of beginning. Which tract #2 contains 5.20 acres, more or less.

excepting and reserving also Tract No. Three of Garden Tracts,—

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to sections 9, 10, 15 and 16, T 17 N. R. 5 W. WM; thence north a distance of 302.8 feet; thence north 55°–33′ E a distance of 850 feet to a point which is the point of beginning of Tract #3, thence N 55°–33′ E a distance of 350 feet; thence S 34°–27′ E a distance of 578 feet to a point which is 50 feet from and at right angles to the center line of the Vance Lumber Company's railroad track; thence on a curve to the right, having a radius of 523.14 feet and parallel to center line of aforesaid tract to the northerly line of tract #2 of garden tracts; thence north 34°–27′ W along northerly line of Tract #2 a distance of 635 feet to place of beginning. Which tract contains 5.05 acres, more or less.

excepting and reserving also Tract No. Four of Garden Tracts,—

Beginning at a point on the south line of Section 10, which point is 30 feet easterly from the section corner common to sections 9, 10, 15 and 16 in T 17 N. R 5 W WM; thence North 302.8 feet; thence north 55°–33′ E a distance of 1200 feet to a point which is the point of beginning of tract #4; thence N 55°–33′ E a distance of 218 feet; thence N 2°–08′ E a distance of 342 feet; thence S 28°–39.5′ E to the beginning of a curve having a radius of 397.68 feet; thence on a curve to the right, having a radius of 397.68 feet for a distance of 277 feet to a tangent; thence at right angles to said tangent on a bearing of S 78°–44′ E for a distance of 30 feet; thence S 11°–14′ W parallel to and 50 feet from the center line of the Vance Lumber Co's railroad track, for a distance of 216.5 feet; thence on a curve to the right with a radius of 666.34 feet to the northerly line of Tract #3; thence N 34°–27′ W along northerly line of tract #3 a distance of 578 feet to place of beginning. Which tract contains 4.14 acres, more or less.

Northeast Quarter of Section Ten and South Half of Northwest Quarter, and West Half of Southeast Quarter, and East Half of Southwest Quarter, and Northwest Quarter of Southwest Quarter of Section Eleven, also the timber upon the East Half of Southeast Quarter, Northeast Quarter

and North Half of Northwest Quarter, (subject to the terms and conditions contained in vendor's contract with Weyerhaeuser Timber Company) and Southwest Quarter of Southwest Quarter, all in Section Eleven, Township Seventeen North, Range Five West, W. M.

Northwest Quarter, Southeast Quarter of Northeast Quarter, Northeast Quarter of Southeast Quarter, and South Half of Southeast Quarter, all in Section Twelve, Township Seventeen North, Range Five West, W. M. [72]

North Half of Northeast Quarter, Southwest Quarter of Northeast Quarter, Northwest Quarter of Southeast Quarter, all in Section Twelve, Township Seventeen North, Range Five West, W. M.

Northwest Quarter of Southeast Quarter and that part of the Southwest Quarter of the Southeast Quarter lying North and West of a line drawn diagonally from the Northeast corner of said Forty acres to the Southwest corner of the same; also the standing timber on that part of said forty acre tract South and East of said diagonal line, all in Section Fifteen in Township Seventeen North, Range Five West, W. M.

West Half of Southeast Quarter, North Half of Northwest Quarter of Northwest Quarter, and South Half of Southwest Quarter of Northwest Quarter (less county road right of way), all in Section Sixteen, Township Seventeen North, Range Five West, W. M.

Southeast Quarter of Southeast Quarter of Section Sixteen, Township Seventeen North, Range Five West, W. M.

Northwest Quarter of Southwest Quarter of Section Sixteen, Township 17 North, Range Five West, W. M., except the old Mox-Chehalis county road and the new Mox-Chehalis county road, and that part previously deeded to J. T. McKay for a barn, being about Two Hundred feet square in the Southwest corner of said Forty Acre tract; excepting also that part thereof heretofore deeded by vendor to School District No. 105.

Southwest Quarter of Southwest Quarter of Section Sixteen, Township Seventeen North, Range Five West, W. M., excepting the right of way now owned by Northern Pacific Railway Company, and county road, and excepting also the tract of land South and West of said railroad right of way known as Tax No. Six.

Southeast Quarter of Southwest Quarter and Northeast Quarter of Southwest Quarter of Section Sixteen, Township Seventeen North, Range Five West, W. M., excepting that part thereof heretofore deeded by vendor to said School District No. 105; excepting also the new Mox-Chehalis county road.

South Half of Southwest Quarter of Southeast Quarter of Section Seventeen in Township Seventeen North, Range Five West, W. M., and easement

of passage over Daniel McKay private roadway, which roadway is twelve feet wide and extends across the North Half of Southwest Quarter of Southeast Quarter, and North Half of Southeast Quarter, all in Section Seventeen, Township Seventeen North, Range Five West, W. M.

That portion of Northeast Quarter of the Southeast Quarter lying North and East of Northern Pacific Railway Company right of way and less county roads; also excepting Tax No. 1, being a strip of land lying South of county road to mill; excepting also tract of land described as follows: Beginning at the South Line of Southeast Quarter of Northeast Quarter of said Section Seventeen, Township Seventeen North, Range Five West W. M., North and East of county road, thence Southeasterly Forty-three degrees Forty-eight minutes East along county road two hundred and nineteen feet; thence North eighty degrees thirty-two minutes East two hundred and fifty-eight and six-tenths feet; thence North twenty-nine degrees twenty minutes East one hundred and sixty-five feet to the South line of said Forty acre tract.

Southwest Quarter of Northeast Quarter, Northwest Quarter of Southeast Quarter of Section Twenty One, Township Seventeen North, Range Five West, W. M., and that part of Lot Five lying North and East of county road (excepting the right and easement, [73] if any, of Northern Pacific Railway Company to obtain water supply and conduct the same across said land).

Merchantable timber standing, lying and being upon North Half of Northwest Quarter, Southwest Quarter of Northwest Quarter, and Northwest Quarter of Southwest Quarter, all in Section Twenty-two, Township Seventeen North, Range Five West, W. M. (subject to the conditions contained in vendor's deed from H. B. Marcy and E. Belle Marcy).

All the standing and fallen merchantable timber upon the West Half of Southwest Quarter of Section Twenty, Township Eighteen North, Range Four West, W. M., (subject to the conditions contained in title deed of vendor from State of Washington.)

South Half of Northwest Quarter, Northeast Quarter of Northwest Quarter, and Northwest Quarter of Northeast Quarter, all in Section Thirty-four, Township Eighteen North, Range Four West, W. M.

Southwest Quarter of Section Thirty-four, Township Eighteen North, Range Four West, W. M.

All of the timber upon Section Twenty-five, Township Eighteen North, Range Five West, W. M. (subject to the conditions contained in vendor's deed and contract from Port Blakely Mill Company).

The interest of the vendor in the East forty rods of Northeast Quarter of Northeast Quarter, all in

Section Twenty-six, Township Eighteen North, Range Five West W. M., (which is subject, however, to the right of J. M. Main to acquire the same upon the conditions that the vendor's shingle mill will be allowed to remain thereon for such length of time as the vendor may determine, subject to the conditions that the owner of the shingle mill pay the taxes.)

Southeast Quarter of Section Thirty-two, Township Eighteen North, Range Five West, W. M.

Southwest Quarter, and Northeast Quarter of South-east Quarter of Section Thirty-four, Township Eighteen North, Range Five West, W. M.

The logging railroad of the vendor, commencing at its junction with the Northern Pacific Railway at Malone, in Section Seventeen, Township Seventeen North, Range Five West, W. M., thence across Section Sixteen, Section Fifteen, Section Ten, Section Three, Section Two, and Section One, all in said township; thence across Section Thirty six in Township Eighteen North, Range Five West, Wm., thence across Section Thirty-one and Section Thirty in Township Eighteen North, Range Four West, W. M., including therein all easements for grade and roadbed; also the rails, bridges, angle-bars, switch-materials, frogs, and all spurs, sidings, and branches, said railroad in part extending across the lands agreed to be conveyed as

above described, and also including the following; Beginning at the point which is the section corner common to Section Nine, Ten, Fifteen and Sixteen in Township Seventeen North, Range Five West, W. M., and thence South along the West line of Section Fifteen for a distance of Three Hundred and Fourteen and nine-tenths feet; thence North Thirty-four degrees Thirty-one minutes for a distance of Thirty-three and seven-tenths feet, thence on a curve to the right, said curve having a radius of Six Hundred and Eighty-six and three-tenths feet, for a distance of Four Hundred and ninety-two and six-tenths feet; thence on the tangent of said curve which bears North Seventy-five degrees Forty-seven minutes East, for a distance of one hundred sixty-nine and eight-tenths feet to a point on the North line of Section fifteen, thence [74] South eighty-seven degrees four minutes West along the north line of section fifteen for a distance of Five Hundred and Eighty and six-tenths feet to place of beginning; also including the tract of land commencing at a point on the section line one hundred and six feet West of the Northeast corner of Section Sixteen, Township Seventeen North, Range Five West, W. M., thence West along the North line of said Section to a point one hundred and sixty-four feet from the point of beginning; thence Southeasterly Eighteen degrees South ten degrees East to a point three hundred and sixty-one feet from Section line at point of intersection

with said railroad right of way; thence Northeasterly along said right of way three hundred and forty feet to point of beginning; also beginning at the Northeast corner of Section Sixteen, Township Seventeen North, Range Five West, W. M., thence South on Section line between Sections Fifteen and Sixteen, variation Twenty-five degrees Thirty minutes East six hundred and sixty-six and two-tenths feet; thence West one hundred and ninety-five feet to intersection of the East line of said railroad; thence Northwesterly on said railroad right of way line to its intersection of the North line of said section sixteen; thence East forty-five and two tenths feet to the place of beginning; also a strip of land for railway right of way sixty feet wide across the North thirty acres of Northeast Quarter of Northeast Quarter of said Section Sixteen, the same being thirty feet on each side of said railroad as laid out (subject to leasehold agreement contained in vendor's title deed); also a strip of land sixty feet wide across the South ten acres of the Northeast Quarter of Northeast Quarter of said Section Sixteen, Township Seventeen North, Range Five West, W. M., the same being thirty feet on each side of said railroad as laid out.

Also that part of Southwest Quarter of Northeast Quarter of Section Sixteen, Township Seventeen North, Range Five West, W. M., lying south and East of the Mox-Chehalis county road.

Also a strip of land sixty feet wide across the Southeast Quarter of Northeast Quarter of said

Section Sixteen, Township Seventeen North, Range Five West, W. M., the same being thirty feet on each side of the said railroad as now laid out.

(c) The said lands and said railroad to be conveyed by the vendor subject to all the conditions, exceptions and reservations contained in the vendor's title; also excepting all property, estates and interest severally excepted and reserved by the patents and deeds in the several chains of title.

(d) Also all buildings and fixtures upon the said lands, and also the following described personal property: Saw-mill building, power plant, machine shop, machinery, supplies, shingle mills and all machinery therein, shingle mill dry kilns, planing mill and machinery and dry kilns, hotel and equipment, store and office building, stock of merchandise and office equipment, pool hall and picture-show house and equipment; sixteen logging engines with all lines, blocks, and equipment; two steam shovels, one 63-ton Heisler geared locomotive, one 50-ton Heisler geared locomotive, one Baldwin locomotive class 12–30¼ E–88 No. 55804, all logging trucks, about forty-one in number, three wood racks, eight flat cars, six gravel cars, one steel moving car, three oil-tank-cars, camp cars and equipment, all rails and supplies therewith, stock of lumber on hand on January 1, 1924; all logs in pond and in woods and all other personal property owned and used by the vendor at Malone, Washington, in its logging and lumbering operations, excepting and reserving, however, its books of entry and account, its office files, accounts receivable and bills receiv-

able and all lumber and logs shipped or billed prior to January 1, 1924. [75]

(E) The vendor agrees to assign to the vendee its right, title, estate and interest in that certain contract made January 1, 1923, between Hewitt Land Company as vendor and Vance Lumber Company as vendee for the purchase by Vance Lumber Company of Section twenty-nine, Section Thirty-one, and Southwest Quarter of Section Thirty-two all in Township Eighteen North, Range Four West, W. M.

Upon full payments having been made by the vendee of the purchase price hereinafter set out, the vendor agrees that it will make or cause to be made to the vendee herein a deed to said lands, subject only to the exceptions, reservations, and conditions contained in said contract.

The vendor also agrees to assign to the vendee its right, title, estate and interest in that certain contract made April 12, 1912, between Milwaukee Land Company as vendor and Vance Lumber Company as vendee, for the purchase by Vance Lumber Company of Lot One, or the Northeast Quarter of the Northeast Quarter, Lot Two, or the Northwest Quarter of the Northeast Quarter, and the South Half of the Northeast Quarter of Section Two, Township Seventeen North, Range Four West, W. M., and

The Northeast Quarter and the North Half of the Southeast Quarter of Section Twenty; the Northwest Quarter and the Southwest Quarter of Section Twenty-two; and the Southeast Quarter of

Section Twenty-six; the Northeast Quarter of Section Twenty-eight, the east half, the east half of the Northwest Quarter, Lot One or the Northwest Quarter of the Northwest Quarter, Lot Two, or the Southwest Quarter of the Northwest Quarter, the East Half of the Southwest Quarter, Lot Three, or the Northwest Quarter of the Southwest Quarter, Lot Four, or the Southwest Quarter of the Southwest Quarter of Section Thirty, the Northeast Quarter, the Northwest Quarter, and the Southeast Quarter of Section Thirty-two, all in Township Eighteen North, Range Four West, W. M.

Upon full payment having been made by the vendee of the purchase price hereinafter set out, the vendor agrees that it will make or cause to be made to the vendee herein a deed to said lands, subject only to the exceptions, reservations and conditions contained in said contract.

SECOND. In consideration whereof, and in consideration of the several terms and conditions of this contract, the vendee promises to pay the vendor the sum of Two Million Five Hundred Thousand Dollars as follows, to-wit: Five Hundred Thousand Dollars in cash on the signing of this agreement, the receipt of which is hereby acknowledged, and Two Hundred and Fifty Thousand Dollars semi-annually, commencing July 1st, 1924, with interest at the rate of five per cent per annum from January 1st, 1924, interest payable semi-annually, and to be evidenced by eight promissory notes, each in the sum of Two Hundred and Fifty Thousand Dollars numbered consecutively from one to eight,

each inclusive, the amount and date of maturity of each of said notes being as follows:
$250,000 on or before the first day of July, 1924;
$250,000 on or before the first day of January, 1925;
$250,000 on or before the first day of July, 1925;
$250,000 on or before the first day of January, 1926;
$250,000 on or before the first day of July, 1926;
$250,000 on or before the first day of January, 1927;
$250,000 on or before the first day of July, 1927;
$250,000 on or before the first day of January, 1928;
[76]
said notes to contain the provision that the vendee may pay not less than Fifty Thousand Dollars upon the note next maturing at any time prior to the due date, said notes to be payable to the vendor or his order at the Bank of Elma, Elma, Washington, and all payments made shall stop interest upon amount so paid.

THIRD. The vendee shall be put into possession of all of the property agreed to be conveyed by this contract as of date January 1st, 1924, and shall have possession and right of possession thereof during the term of this contract.

FOURTH. The vendee is authorized to use and operate all of said property in the usual manner. It is authorized to cut and remove the timber upon the vendor's said lands, including the lands covered by Hewitt Land Company contract and by Milwaukee Land Company contract, as long as the vendee shall, and it agrees to, on or before the 10th day of each calendar month make a written report in triplicate to the vendor, which report shall be a

complete and correct deck scale statement (or if said logs are shipped by rail, then railway scale statement), of all timber cut from said lands, specifying separately the lands covered by Hewitt Land Company contract, from which the timber is cut during the preceding calendar month, and accompanying such report with a cash payment at the rate of $7.50 per thousand feet board measure log deck scale for the total amount of timber shown by said report to have been cut during the preceding month. All payments on account of timber cut shall be applied by the vendor, and endorsed upon the note or notes next falling due, and credited upon this contract. If the vendee shall prepay upon said installment notes an amount equal to the amount to be paid by it in any month for timber cut during the preceding month, then it need not pay said amount for the timber cut during said preceding month. Should the vendee, for any reason, fail to furnish statement and make payment within the time herein provided, to-wit, by the 10th day of each calendar month for the timber cut during the preceding month, it shall have no right to cut timber under this contract until said default has been cured; but this provision is not intended to deprice the vendor of the remedies of forfeiture, rescission, or other remedies provided in this contract or provided by law. In the event that the vendor shall not be satisfied with the scale of logs cut as reported by the vendee from month to month, then the vendor shall be entitled to select and appoint a scaler, to scale said logs in cooperation with

the vendee's scaler, and if said two scalers do not agree in their scale, then they, the said two scalers, shall appoint a third scaler, who from that time on shall scale all logs thereafter cut under this contract by the vendee, and the scale of said third scaler shall be final, binding, and conclusive upon vendor and vendee, and payments shall be made accordingly by the vendee. The vendee shall pay the cost of employment of said third scaler.

FIFTH. It is agreed that whereas the parties contemplate that the property hereby agreed to be sold has additional value because of the proximity and contiguity of timbered lands owned by others, in such position that the same should be, and could be profitably logged in connection with the vendee's operations under this contract, the vendee shall have the right to purchase any of such timbered lands and cut and remove the timber therefrom, with the logging equipment and over the railroad mentioned in this contract. As to all such additional timber, as and when cut and removed, the vendee agrees to, on or before the 10th day of each calendar month, make a written report in triplicate to the vendor, which report shall be a complete and correct deck scale statement of all timber cut from said lands, specifying the lands from which the timber is cut during the preceding calendar month, and accompany [77] such report with a cash payment at the rate of $2.50 per thousand feet board measure log deck scale for the total amount of timber shown by said report to have been cut during the preced-

ing month, which shall be credited upon the notes and applied on the purchase price.

SIXTH. In its possession and operation of said property the vendee agrees to exercise due care not to deplete the property except as in this contract provided, and to keep the operating part of said property in good repair, and not, to allow any part thereof to be or become out of repair or depreciated in value further than that which results from usual use, wear and tear of the same, but will at all times keep all of said property in as good a state of repair as the same is now in, except usual wear and tear thereof.

SEVENTH. The vendee agrees to protect, and hold harmless, and indemnify the vendor from and against all claims for damages to person or property which may arise during the term of this contract from the possession, use and operation thereof by the vendee, or by any third person.

EIGHTH. In the conduct of its logging operations the vendee shall not allow timber to be wasted; it shall log the land clean as it goes and carry on its operations with due regard to the conservation of the property and protection from fire hazard.

NINTH. The vendee agrees that it will not suffer or permit any liens for labor, material, or otherwise, other than for taxes, to be placed upon any of the property embraced in this contract. Nothing contained in this agreement shall be construed to render the vendor liable for any debt or obligation incurred in or about the conduct of operations contemplated by this agreement.

TENTH. The vendee agrees to keep insured against fire, at full coverage, the said saw mill, shingle mill, stock of lumber, mill machinery, office building, store, dwelling houses and merchandise; said insurance shall be carried in companies acceptable to the vendor and the policies to be made payable to the vendor as its interests may appear. In event of recovery upon said insurance policies, or any of them, the amounts collected shall be credited upon the purchase price, and on the installment thereof last falling due.

ELEVENTH. The vendor agrees to pay all taxes, both real and personal, upon or against said property for the year 1922 and prior years. The vendee agrees to pay all taxes and assessments, including fire patrol assessments, levied against or on account of said property, including personal property, for the year 1923 and for subsequent years, at lease fifteen days before such taxes or assessments shall become delinquent, and immediately thereafter furnish the vendor with proper receipts showing such payment.

TWELFTH. The vendee agrees to keep at its office at Malone, Washington, complete and accurate books of account of all matters pertaining to this contract, and accurate log scales of all logs cut and removed from the vendor's said lands, and separately keep accurate log scales of all logs cut from Hewitt Land Company's lands and from Milwaukee Land Company's lands, and from other lands.

The vendor shall have the right at any and all times during business hours to examine the books

of account kept by the vendee covering all of its said operations, and shall have full access to all the premises and property for the purpose of inspection.

The vendee agrees that on or before the first day of March in each year, during the term of this contract, to render a complete statement of its financial condition, and its operations for the preceding calendar year, to the vendor, which statement shall be received and kept in confidence by the vendor. [78]

THIRTEENTH. It is agreed that this contract shall be effective as of date January 1, 1924. The vendee agrees to accept and pay for all merchandise and supplies ordered or contracted for by the vendor during 1923 and not delivered until 1924. All expenses of operation and care of said property, cost of materials, supplies, merchandise, and labor furnished or received during the year 1924 shall be for the account and at the expense of the vendee. The vendee agrees to pay to the vendor the *pro rata* cost of all policies of fire insurance procured by the vendor before the outstanding on January 1st, 1924.

All accounts receivable and bills receivable owing to Vance Lumber Company when this contract takes effect, including all lumber shipped or billed up to that time, and all unsettled credits, are reserved to the vendor and do not pass to the vendee under this contract of sale. The vendor's books of account and office files of its business are likewise reserved to the vendor and are not to pass under this contract of sale.

FOURTEENTH. The vendor agrees to correct any substantial defects in the title of the several tracts of land to be conveyed under this contract and by its deed to warrant the title thereto under the vendee. And the vendee shall and does accept the title to said property at this time, and hereby waives any right or remedy of rescission and/or forfeiture on account of the condition of the title. The vendee does, and shall depend upon the examination made by it of said property and of the title thereto, and has not depended upon any statement, representation or opinion made by the vendor, its agents or attorney.

FIFTEENTH. It is agreed that the vendor shall and it does reserve unto itself the title of all the property agreed to be conveyed by it to the vendee, and that the vendor shall retain said title until by full payment of the purchase price, both principal and interest, the vendee shall be entitled to receive title, provided that when payments have been made hereunder until there remains no more unpaid than one million dollars of the principal of said notes the vendee may at its option execute a mortgage to the vendor upon the property aforementioned to secure payment of the balance then unpaid, and upon the delivery of such mortgage to the Bank of Elma for the party of the first part all deeds, bills of sale and other documents to vest title to all of said property in the vendee shall be by said Bank delivered to the vendee.

SIXTEENTH. The vendee shall have no right to sell, assign, transfer, mortgage, or otherwise en-

cumber this contract nor any right or interest therein without the written consent of the vendor first obtained. In the event of sale, assignment, transfer, mortgage, or other encumbrance, the vendee shall remain liable under this contract, and the person to whom such sale, assignment or transfer is made shall likewise be liable thereon.

SEVENTEENTH. The Vendor agrees that whereas it is indebted at this time upon Hewitt Land Company contract of purchase in the principal sum of $275,000 (interest to January 1, 1924, having been paid by it) and is indebted upon Milwaukee Land Company contract of purchase in the principal sum of $50,000, with interest in the sum of $542.47, (the same being the interest to June 11, 1923, on which date the vendor tendered to Milwaukee Land Company the principal and interest), the vendee is given the option to pay said [79] Hewitt Land Company, and said Milwaukee Land Company the full amount owing each respectively, and in the event of payment by vendee to Hewitt Land Company and Milwaukee Land Company it shall furnish the vendor with written evidence of said payment or payments, and the amount thereof shall be credited as of the date of such furnishing upon the note or notes last falling due, and on the last installment of the purchase price.

EIGHTEENTH. The right and power of reentry reserved to the vendor is intended to be in addition to all other rights and remedies available at law or in equity for the protection and security of the vendor, and the conservation of the property

covered by this contract. The vendor at its discretion, in the event of any default by the vendee, may pursue any remedies available at law or in equity.

Any failure of the vendor to insist upon strict performance of any of the conditions or limitations herein contained, or to exercise any right conferred in any one or more instances, shall not be construed as a waiver or relinquishment for the future of any such condition, limitation of right, but the same shall be and remain at all times in full force and effect during the life of this contract.

NINETEENTH. Should the Chicago, Milwaukee & St. Paul Railway Company, or any of its subsidiary companies, build an extension into the territory and be in position to transport shipments of lumber or products manufactured from the timber taken from the lands covered by the Milwaukee Land Company contract, the vendee agrees that it will offer to said railway company, for transportation over its lines, all shipments which it can handle at as low rates as any competing transportation line.

TWENTIETH. All unfilled orders for lumber and shingles on the books of the vendor on January 1st, 1924, shall be taken over and filled by the vendee at the order prices and upon the terms shown by said orders. A list of said orders and the files thereof is delivered contemporaneously with this contract.

TWENTY-FIRST. The vendee has been furnished with a true copy of Hewitt Land Company

contract and of Milwaukee Land Company Contract, and in its logging and lumbering operations shall strictly keep and perform each of the provisions and requirements of each of said contracts, but this provision is not intended to allow or require the vendee to make payments on account of timber cut direct to either Hewitt Land Company or Milwaukee Land Company. Should the vendor fail to make such payment or payments to Hewitt Land Company by the 15th day of the month, as required by the contract with that company, then the vendee may pay the same direct to Hewitt Land Company, and such payment shall be a credit, and credited on the note next falling due.

TWENTY-SECOND. The vendee shall keep said timber on said lands, and that which has been cut and removed from said lands, free from all labor liens, mortgages, or any other liens or encumbrances, until the payments of said $7.50 per thousand feet for said timber cut during the said next preceding month have been made. The title to, and the right of possession of, all such timber, whether cut or uncut, and all lumber, shingles, or other products of such timber manufactured therefrom, shall be and remain with vendor until the monthly payments of said purchase price have been paid to vendor as above set forth. [80]

TWENTY-THIRD. The vendor agrees to pay on or before the due date all amounts to be paid by it under the contracts with Hewitt Land Company and Milwaukee Land Company, and agrees to hold the vendee harmless in respect thereto, upon

the condition, however, that the vendee shall punctually make the statements and payments required of it from month to month of timber cut on the lands covered by the several said contracts.

TWENTY-FOURTH. The parties agree that time shall be and is hereby made of the essence of this agreement and of each and every term and condition thereof to be kept and performed by the vendee. Should the vendee, for any cause, fail to furnish statements of timber cut and make payment accordingly within the time specified in this contract, then its right to cut timber shall end without notice, and it shall immediately cease cutting and removing the timber from the lands to be conveyed under this contract.

If the vendee shall fail to make payments of principal and interest at the time and place specified in this contract or within sixty days thereafter, then, at its option, the vendor shall have the right to declare this contract null and void, and repossess itself of all the property thereto agreed to be conveyed and of all extensions, additions and substitutions thereto, and in that event all rights granted to the vendee hereby shall cease and terminate and all sums of money paid and all acts done in the betterment, improvement, replacement of or additions to said property, or any part thereof, shall be, become, and remain the property of the vendor, and the vendee shall, and it agrees to surrender and yield up all thereof to the vendor, and all payments on account of purchase price, whether principal or interest, and all other payments made by the

vendee, shall be retained by the vendor as liquidated damages.

TWENTY-FIFTH. The vendor assigns to the vendee its contract with Northern Pacific Railway Company for the maintenance and operation of its spur track in connection with the main track of the Grays Harbor branch of Northern Pacific Railway Company. The vendee takes over said contract, and while said contract is in force agrees to be bound by its terms and saves the vendor harmless in respect thereto.

The vendor hereby assigns to the vendee its average demurrage contract with Northern Pacific Railway Company of date March 2nd, 1920. During the life of said contract the vendee agrees to be bound by its terms and to save the vendor harmless in respect thereto.

TWENTY-SIXTH. It is agreed that in the event of fire in the mills or timber, or of floods, strikes of employees, or for other causes beyond the control of the vendee, said party shall be unable to continue its logging operations or the operation of said mills, then the time for the making of the next maturing payments herein provided for shall be suspended and extended for a length of time equal to the time such operations shall be necessarily suspended, such suspension and extension of time, however, to not exceed at any one time more than three months. This provision for extension shall not be applicable unless the vendee shall make written request to the vendor for such extension within thirty days after the period of shut-down.

TWENTY-SEVENTH. The vendor agrees that it shall and will at this time place in escrow at and with the Bank of Elma, Elma, Washington, the deed, bill of sale, and policies of insurance outstanding upon said property on January 1, 1924. Said deed and bill of sale shall be held by the Bank of Elma for delivery to the vendee upon the payment by it of the full amount of the [81] *of the* purchase price, principal, and interest, or the giving of a mortgage as above provided. If the vendee shall fail to pay any part of the purchase price as in this contract and in said notes provided, and said default shall continue for sixty days, then the Bank of Elma shall, and it is hereby authorized to, return, surrender, and deliver to the vendor said deed and bill of sale, and upon such delivery the vendee shall, and it agrees to, surrender and yield up all of the property covered by this contract, real, personal and mixed, and thereby, and by said default, all rights and remedies of the vendee shall cease and terminate. In the event of any forfeiture or rescission by the vendor at law or in equity of this contract, all payments on account of purchase price shall be retained by the vendor as liquidated damages.

TWENTY-EIGHTH. The real estate agreed to be conveyed, insofar as it applies to Section One, Two and Three of Township Seventeen, Range Five West W. M., is intended to convey the easement acquired from Weyerhaeuser Timber Company by the Vendor, and insofar as it applies to Section

Thirty-six, Township Eighteen, North Range Five West, W. M., it is intended to convey the easement acquired from the State of Washington by the vendor, and to convey no greater interest than said easements.

IN WITNESS WHEREOF, the parties hereto have executed this contract by their proper officers thereunto duly authorized, this 9th day of January, 1924.

VANCE LUMBER COMPANY,
By (Signed) J. A. VANCE,
President.
Attest: (Signed) H. B. DOLLAR,
Secretary.
MASON COUNTY LOGGING COMPANY,
By (Signed) THOMAS BORDEAUX,
President.
Attest: WILFRED BORDEAUX,
Secretary. [82]

PLAINTIFF'S EXHIBIT No. 4.

Q–I

VANCE LUMBER COMPANY.

Malone, Washington.

July 5th, 1923.

This property consists of a sawmill, with a capacity of 140,000 feet per eight-hour day, blacksmith and machine shops. Planing-mill with necessary dry kilns and dry lumber sheds. Two shingle-mills with dry kilns. We have just recently com-

pleted the installation of a 1000 K. W. General Electric Company turbine, with necessary motors for supplying power for the above properties.

Office and store building with stock of merchandise, hotel with accommodations for 100 people, 65 cottages for the accommodations of employees with families, pool-hall and picture-show house.

The logging equipment consists of one 100-ton Baldwin rod engine (new), two Heisler geared locomotives, 17 donkey engines with necessary lines, blocks, etc., two steam shovels, eleven (11) flat cars, one (1) steel moving car, three (3) oil tank cars, forty-two (42) connected logging trucks, six (6) ballast cars, camp cars for two (2) camp units and about fourteen (14) miles of standard guage railroad.

Standing timber which will cut 400,000,000 feet, about 75 to 80% is Fir, balance Spruce, Hemlock and Cedar. There is also, about 500,000,000 feet of standing timber available but not owned by the Company.

Following is legal description of Vance Lumber Company holdings in Grays Harbor and Thurston Counties, Washington:—

Description	Section	Township / Range
NE.¼ of	Section 2 (	
E.½ & N.½ of SW.¼, S.½ of NW.¼	Section 6 (	Twp. 17 North,
All of	Section 8 (	Range 4, West.
E.½, NW.¼ of	Section 12 (	
S.½, NE. ¼, E.½ of NW.¼	Section 11 (	
W.½ of S.E.¼	Section 15 (	Twp. 17 North,
W.½ of SW.¼, W.½ of NW.½, NE.¼ of NW.¼	Section 22 (	Range 5, West.
SW.¼ of NE.¼, NE.¼ of SE.¼	Section 21 (	
NE.¼ of NE.¼	Section 28 (	
NE.¼, N.½ of SE.¼, W.½ of SW.¼	Section 20 (	
W.½	Section 22 (	Twp. 18 North,
SE.¼	Section 26 (	Range 4 West.
NE.¼	Section 28 (	
All of Sections 29–30–31–32	(	
NW.¼ of NE.¼, E.½ of NW.¼, SW.½ of NW.¼, SW.¼	Section 34 (	
All of Sections 25–36	(	Twp. 18 North,
N.½, SE.¼, N.½ of SW.½	Section 35 (	Range 5 West.

Also:—Land in Sections 10–16–17, Twp. 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, *as* situated.

All the above property is situated in Grays Harbor and Thurston Counties, State of Washington. [83]

PLAINTIFF'S EXHIBIT No. 5.

No. 596.

VANCE LUMBER COMPANY,

Manufacturers,

LUMBER AND SHINGLES.

Malone, Washington.

August 15, 1923.

Miss R. M. Gaunt,
Box 1426,
Tacoma, Washington.

Dear Miss Gaunt:

As we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us again.

Yours truly,

VANCE LUMBER COMPANY.

H. B. DOLLAR.

HBD:C [84]

PLAINTIFF'S EXHIBIT No. 6.

No. 596

Montesano, Washington,
August 28th, 1923.

Mason County Logging Co.,
Bordeaux, Washington.

Dear Sirs:

The Vance Lumber Company herewith gives you an option, to be exercised within sixty (60) days from this date, to purchase for the price of $3,250,-000.00, its entire lumbering and logging properties, including its saw mill, planing mill, shingle mills and all property appurtenant thereto; its office and store buildings, hotel, all of its cottages, pool hall, picture show house, including all of its timber properties, and all its logging railroad and all properties used in the operation thereof and in its logging operations. All of this property is located at and near Malone, in Grays Harbor County, part of the timber being in Thurston County.

The accounts receivable, bills receivable and books of account are not included in our offer, nor any timber or lumber which up to the time of the exercise of the option is either removed from the land or shipped away from the mill.

We would, however, expect you to fill at the order price any unfilled or partially filled orders in existence at the time of exercising the option.

There are some matters of title yet to be perfected by the Milwaukee Land Company and some

of our lands we have sold upon contract and would expect that you would take these lands [85]

August 28th, 1923.

Mason County Logging Co.—No. 2.

subject to these contracts, and of course receive the balance of the unpaid purchase price.

Also there are two or three contracts for easements which, in the event of sale to you, would have to be taken into consideration.

Of the said price, $1,000,000. is to be cash payment; balance on terms hereinafter to be agreed upon.

There is herewith sent you a list of our timber lands headed "TIMBER LANDS." There is also sent you a list of all of our lands covered by the option which includes the timber lands and the logged off lands. This is entitled "TIMBER LANDS AND LOGGED OFF LANDS."

Yours very truly,

VANCE LUMBER CO.,

By J. A. VANCE, Pres.

Encl. [86]

PLAINTIFF'S EXHIBIT No. 7.

No. 596.

VANCE LUMBER CO.

vs.

MALONE, WN.

J. A. Vance, Pres. & Mgr. M. A. Vance, Vice-Pres. H. B. Dollar, Secy.

M.

VANCE LUMBER COMPANY,
Manufacturers.
LUMBER AND SHINGLES
Malone, Washington.

Long Distance Phone,
Elma, Main 822
May 9, 1925.
(Seal)

Mr. R. M. Gaunt,
Tacoma, Wash.

Dear Sir:

Referring to your letter of the 7th to Mr. Vance, Mr. Vance has been sick for the last few weeks and intends leaving for Seattle to-day, to be gone for a week or so, but should you desire to bring this party down here to look over the plant, the writer will be here at that time and will be very pleased to show him around.

Your truly,
VANCE LUMBER COMPANY,
By H. B. DOLLAR.

HBD:C. [87]

PLAINTIFF'S EXHIBIT No. 8.

No. 596.

Lock Box 1426.
Tacoma, Washington.

August 29th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:—

I received your letter which was written the 15th inst., where you requested me not to do anything further until I heard from you.

I have not written to Mr. Reed since that time, but I am interested to know if he or his associates are the parties to whom you are giving an option on your timber? Or anyine to whom Mr. I. A. Wilson submitted the property?

I have not told anyone about submitting the property to Mr. Reed, as this is my deal only, this time. And I do not expect to tell anyone about it at any time.

If he or his associates are not the parties who are taking the option, then I would be *a* liberty to offer them another tract of timber.

Thanking you in advance for an expression concerning this, which will be greatly appreciated by me.

Yours very truly,

RMG:C. [88]

PLAINTIFF'S EXHIBIT No. 9.

No. 596.

Lock Box 1426.
Tacoma, Washington.

August 9th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:

I have this day submitted your timber and mill property at Malone, to Mark E. Reed of the Simpson Logging Company, and his associates, for their consideration.

As you do not want any undue publicity, I requested them to keep the matter quiet. They will respect Mr. Vance' wishes in this matter.

He wrote me that they would give this proposition their consideration if I would send plat and data which you gave *me* to me. Owing to the financial responsibility of these parties whom I know are amply able to handle a property like yours, I trust this will meet with your approval.

The former agreement with you concerning a commission for me and my associates, will be all right for this time also.

Yours very truly,

RMG:C. [89]

PLAINTIFF'S EXHIBIT No. 10.

No. 596

Lock Box 1426,
Tacoma, Washington.

January 17th, 1924.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:—

I have read the announcement of the sale of the Vance Lumber Company's timber and holdings in Grays Harbor County to the Mason Logging Company, which is one of the Company's to whom I expected the maps and information concerning the Vance property, would be submitted by Mr. Mark E. Reed, for their consideration.

Upon completion of the sale I hope to be substantially remembered by the two (2%) per cent commission on the sale price, which you promised me.

Congratulating you upon the successful deal, and *hp*oing to hear from you soon,

Yours sincerely,

R. M. GAUNT.

RMG:C. [90]

PLAINTIFF'S EXHIBIT No. 11.

No. 596

VANCE LUMBER CO.

vs.

MALONE, WN.

J. A. Vance, Pres. & Mgr. M. A. Vance Vice-Pres. H. B. Dollar, Sec'y.

VANCE LUMBER COMPANY,

Manufacturers

LUMBER AND SHINGLES.

Malone, Washington.

Long Distance Phone,
Elma, Main 822
September 3, 1923.

Miss R. M. Gaunt,
Tacoma, Wash.

Dear Miss Gaunt:

Referring to your letter of August 29th wish to advise that Mr. Reed is not the party to whom we have given the option. As soon as any action is taken on the option we will be very *t*glad to advise you.

Yours very truly,
VANCE LUMBER COMPANY.
By H. B. DOLLAR. [91]

PLAINTIFF'S EXHIBIT No. 12.

No. 596

VANCE LUMBER COMPANY.

Malone, Washington.

July 11, 1923.

Miss R. M. Gaunt,

Tacoma, Wash.

Dear Madam:

The writer was in Aberdeen yesterday and learned that our property here was being offered on the street for sale.

We were very much surprised to hear this as when we gave you the information regarding our holdings we were led to believe that you had a party who was interested in a proposition of this kind and did not give you information expecting that it would be offered in this way.

We would thank you to let us hear from you regarding this.

Yours very truly,

VANCE LUMBER CO.,

By H. B. DOLLAR. [92]

PLAINTIFF'S EXHIBIT No. 13.

No. 596.

Lock Box 1426,
Tacoma, Washington.

December 17th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:–

I have been desirous to know how the timber deal is progressing. I must tell you something that I have learned from a timber dealer friend of mine, who unknowingly told me that the Vance Company were about to close the deal for their timber and equipment, that the final cruise and all the papers were about completed. The buyer is a personal friend of his, but requested him to not mention his name.

I let him tell me all this, but never told him that I knew the Vance Company or had any interest in what they were doing.

I will be glad to know if it is anyone of Mr. Mark Reed's associates who are buying the property, as Mr. Reed said it would be one of them. If you would be willing to trust me with this information, I promise to not tell it to anyone, until you give me permission to do so. If the buyer is one to whom Mr. Reed put up the proposition and he become interested, then I would be entitled to the commission on the sale price of the deal, as you requested me not to do anything until I heard from you. I have never mentioned it to anyone.

It was necessary to tell Mr. Wilson at the time I received your letter, that you had informed me that you had given an option to some one, and had requested him not to offer your property to anyone. That is all I told him. I did not know to whom you had given your option.

Hoping that you are getting the deal closed satisfactory, and wishing you the "Compliments of the Season,"

Yours very truly,

RMG:C. [93]

PLAINTIFF'S EXHIBIT No. 14.

Being Defendant's Exhibit No. 9 Attached to the Bordeaux Deposition.—CLERK.

No. 596.

August 27, 1923.

Mason County Logging Co.,
Bordeaux, Washington.

Dear Sirs:

The Vance Lumber Company herewith gives you an option, to be exercised within sixty days from this date, to purchase for the price of $3,250,000.00, its entire lumbering and logging properties, including its saw mill, planing mill, shingle mills and all property appurtenant thereto; its office and store buildings, hotel, all of its cottages, pool hall, picture show house, including all of its timber properties, and all its logging railroad and all properties used in the operation thereof and in its logging operations.

All of this property is located at and near Malone, in Grays Harbor County, part of the timber being in Mason County.

Of the said price, $1,000,000, is to be cash payment, balance on agreed terms.

There are some matters of title and easements which will have to be adjusted, but a list of the lands, including the timber lands and also including the logged-off lands are herewith submitted to you.

Yours truly, [94]

PLAINTIFF'S EXHIBIT No. 15.

No. 596.

J. A. Vance, Pres. & Mgr. M. A. Vance, Vice-Pres. H. B. Dollar, Sec'y.

VANCE LUMBER COMPANY

(Seal) Manufacturers

LUMBER AND SHINGLES.

Malone, Washington.

Long Distance Phone,
Elma, Main 822.

May 7, 1921.

Mr. R. M. Gaunt,
Lock Box 1426,
Tacoma, Washington.

Dear Sir:–

Replying to yours of April 30th, in which you say you have a party who would like to purchase a large tract of timber with a saw mill included, will

say that I stopped in Tacoma last night to see you and found that the address I had was only a lock box at the Post Office and did not know where to find you. But would not care to state whether or not we would care to sell until after I had talked with you. If this party is really interested and has money to put up, we might be interested in talking sale.

Yours truly,
VANCE LUMBER COMPANY,
By J. A. VANCE.

JAV—H [95]

PLAINTIFF'S EXHIBIT No. 16.

No. 596.

Lock Box 1426,
Tacoma, Washington.

April 30th, 1921.

Vance Lumber Company,
Malone, Washington.

Gentlemen:–

I am looking for a large tract of timber with a mill included, if I can get it. Would you kindly let me know if you will sell your entire holdings in that locality?

If you are willing to sell, name your price that you will take for all, including commission to me for making the sale. This will be kept strictly confidential.

I have a big buyer who wants a large tract of

good timber. If you will let me know as soon as possible, you will greatly oblige me.

Yours very truly,

RMG:C. [96] R. M. GAUNT.

DEFENDANT'S EXHIBIT "A-1."

No. 596.

Lock Box 1426,
Tacoma, Washington.

May 25th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:

May I ask if you have sent the plat of timber, price and description of your property to

Mr. Isaac A. Wilson,
Aberdeen, Washington.

c/o "Hotel Turner."

Or, do you expect him to come to your office again to talk to you?

Awaiting your answer,

Yours very truly,

R. M. GAUNT.

RMG:C. [97]

DEFENDANT'S EXHIBIT "A-2."

No. 596.

Lock Box 1426,
Tacoma, Washington.

July 12th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:

I received your letter and was very much surprised. I immediately called Mr. I. A. Wilson over the phone, and he assured me that he has offered your property to no one else but the Anderson & Middleton Mill Company of Aberdeen, nor has he talked to anyone else about it at all. And he told them to keep it quiet; he says he does not know how the information has gotten out of their office.

We regret this very much. I presume you have received Mr. Wilson's letter advising you that he had submitted the data and plat of your property to the above firm. One member of the company has been back east, and they expect him home by the 15th of this month. Then they will be ready to take up this proposition with all of them upon his arrival.

Mr. Wilson expects to go to Aberdeen early next week, and will report to you as soon as he can do so.

Hoping this will come out all right,

Yours very truly,

RMG:C. [98]

DEFENDANT'S EXHIBIT "A-4."

Lock Box 1426,
Tacoma, Washington.

June 16th, 1923.

Mr. H. B. Dollar,
Malone, Washington.

Dear Sir:—

While I was in Seattle yesterday I called on Mr. Vance at his office. He told me he was not very well. I am sorry to see that he has not yet recovered from his recent illness.

He told me to say to you, that you could go on and get the data together, then he and you would get together on the price and terms of sale.

If you will kindly name the price and include our commission, I will appreciate it very much, as I never like to change figures that the owner gives me.

Then Mr. Wilson can submit it to his people, and take them to see the property.

Mr. Wilson is going to reside in Tacoma in future, and it will be just as well if you send the papers to me. Then I can give them to Mr. Wilson.

If you will give the name of the last cruiser whom you employed, as they always ask for that. Also the percentage of each kind of timber, the number of miles of railway, and the equipment. Also, the plat of timber.

Thanking you in advance for an early reply,

Yours very truly,
R. M. GAUNT.

RMG.:C. [99]

[Title of Court and Cause.]

ORDER DIRECTING INCLUSION OF EXHIBITS IN TRANSCRIPT ON APPEAL.

On motion of the above-named defendant, and it appearing to the above-entitled court that it is necessary and proper that the documentary exhibits hereinafter referred to be inspected by the Circuit Court of Appeals for the Ninth Circuit upon the appeal herein, the Clerk of the above-entitled court be, and he is hereby, directed to incorporate into the transcript on appeal herein the following exhibits, introduced at the trial of said cause, to wit:

> Defendant's Exhibits "A-3," "A-5," and Deposition of Thomas Bordeaux, with exhibits attached thereto marked Defendants' Exhibits 1 to 23, inclusive;

and that said Clerk of said District Court certify said documentary exhibits as originals and forward them to the Clerk of the Appellate Court at the time the certified transcript of record is transmitted.

Done in open court this 8th day of November, 1928.

JEREMIAH NETERER.

[Endorsed]: Filed Nov. 8, 1928. [100]

[Title of Court and Cause.]

ORDER DIRECTING INCLUSION OF COMPLAINANT'S EXHIBIT No. 2 IN TRANSCRIPT ON APPEAL.

On motion of the above-named plaintiff, and it appearing to the Court that the parties have stipulated that the original exhibits be certified by the Clerk, and it appearing to the Court that it is necessary and proper that the documentary exhibits hereinafter referred to be inspected by the Circuit Court of Appeals for the Ninth Circuit from the appeal herein, the Clerk of the above-entitled court be and he is hereby DIRECTED to incorporate in the transcript on appeal herein the following exhibits introduced at the trial of said cause, to wit, in addition to those heretofore ordered sent up.

Complainant's Exhibit Number 2 (inclusive), and that said Clerk certify said documentary exhibits as originals and forward the same to the Clerk of the Circuit Court of Appeals at the time the certified copy of transcript of the record is transmitted.

Done in open court this 17 day of November, 1928.

BOURQUIN,
District Judge.

O. K.—P. F. F. & E.,
Attys. for Def.

[Endorsed]: Filed Nov. 17, 1928. [101]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 20, 1928, TO PREPARE AND CERTIFY RECORD ON APPEAL.

Upon application of Chas. A. Wallace, attorney for the plaintiff in the above-entitled cause, for an order extending the time within which to prepare, have certified and sent up to the Circuit Court of Appeals the record in the above-entitled cause, and it appearing to the Court a proper matter therefor, it is hereby

ORDERED that the time within which to prepare and have certified the record on appeal in the above-entitled cause be and the same hereby is extended to and including the 20th day of November, 1928.

Dated this 22d day of October, 1928.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Oct. 22, 1928. [102]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court of the United States:

You will please prepare transcript on the appeal of the above numbered and entitled cause and

include therein the following papers, omitting captions except in original complaint, to wit:

1. Bill of complaint.
2. Answer of defendant to bill of complaint.
3. Minute entry made March 22, 1928, showing order of Court substituting Carrie Gaunt, executrix of Ruby M. Gaunt, deceased, as plaintiff in the above-entitled action.
4. Opinion of the Court.
5. Decree.
6. Complainant's petition for appeal and allowance.
7. Notice of appeal.
8. Complainant's assignment of errors.
9. Complainant's citation.
10. Complainant's praecipe, with proof of service and certificate.
11. Complainant's Exhibits numbering from one to sixteen both inclusive. (Except No. 2—original sent up.)
12. Defendant's Exhibits "A-1, "A-2" and 'A-4." [103]
13. Bond on appeal.
14. Statement of the evidence.

B. S. GROSSCUP,
W. C. MORROW,
C. A. WALLACE and
JOHN O. DAVIES,
Solicitors for Appellant.

[Endorsed]: Filed Sept. 7, 1928. Ed. M. Lakin, Clerk. By S. Cook, Deputy. [104]

[Title of Court and Cause.]

ADDITIONAL PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

Please include in the transcript on appeal in the above matter an order this day entered directing the inclusion of certain documentary exhibits in the transcript on appeal in the above matter.

W. H. ABEL,
POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Defendant.

[Endorsed]: Filed Nov. 8, 1928. [105]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 105, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said Dis-

trict Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [106]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return, 293 folios at 15¢ $43.95

Certificate of Clerk to Transcript of Record, with seal .... .50

Certificate of Clerk to Original Exhibits, with seal .... .50

Total $44.95

I hereby certify that the above cost for preparing and certifying record, amounting to $44.95, has been paid to me by solicitors for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, at Seattle, in said District, this 21st day of November, 1928.

[Seal] ED. M. LAKIN,

Clerk, United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [107]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America to Vance Lumber Company and W. H. Abel and A. J. Falknor, Its Attorneys:

You and each of you are hereby notified that in a certain case in equity in the District Court of the United States for the Western District of Washington, Northern Division, wherein Ruby M. Gaunt was complainant and the Vance Lumber Company is defendant, being Equity Cause No. 596, appeal has been allowed the complainant to the Circuit Court of Appeals for the Ninth Circuit. You are hereby cited and admonished to be and appear in said court at San Francisco thirty (30) days after the date of this citation to show cause, if any there be, why the decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court

for the Western District of Washington, Northern Division, this 7 day of September, 1928.

JEREMIAH NETERER,
United States District Judge.

[Seal] Attest: ED. M. LAKIN,
United States District Clerk.
By S. M. H. Cook,
Deputy. [108]

[Endorsed]: Filed Sep. 7, 1928. [109]

[Endorsed]: No. 5636. United States Circuit Court of Appeals for the Ninth Circuit. Carrie Gaunt, as Executrix of the Estate of Ruby M. Gaunt, Deceased, Appellant, vs. Vance Lumber Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 23, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5636

9

United States

Circuit Court of Appeals

For the Ninth Circuit.

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a Corporation,

Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

FILED

MAR 7 - 1929

PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5636

United States

Circuit Court of Appeals

For the Ninth Circuit.

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a Corporation,

Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Defendant's Exhibit No. 6—Letter Dated June 21, 1923, Thomas Bordeaux to W. H. Abel 11

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Defendant's Exhibit No. 21—Letter Dated November 23, 1923, Mason County Logging Co. to W. H. Abel 34

In the Superior Court of the State of Washington, for the County of King.

No. 182,091.

Dept. No. ——.

R. M. GAUNT,

Plaintiff,

vs.

VANCE LUMBER COMPANY, a Corporation,
Defendant.

DEPOSITION OF THOMAS BORDEAUX, FOR DEFENDANT.

BE IT REMEMBERED, that on Monday, December 14th, 1925, at the hour of two o'clock P. M. of said day, at the office of W. F. Humphrey, Standard Oil Building, City and County of San Francisco, State of California, the deposition of Thomas Bordeaux, a witness for the defendant in the above-entitled cause, came on to be taken, pursuant to stipulation, before Laura E. Hughes, a notary public in and for the City and County of San Francisco, State of California, duly commissioned and sworn, and authorized to administer oaths, etc.; that on said occasion Charles A. Wallace, attorney appeared on behalf of the plaintiff, and W. H. Abel, attorney, appeared on behalf of the defendant. That the said Thomas Bordeaux was duly sworn to testify the truth, [1*] the

*Page-number appearing at the foot of page of original certified Supplemental Transcript of Record.

whole truth and nothing but the truth, whereupon the following proceedings were had:

Direct Examination.

(By Mr. ABEL.)

Q. State your name. A. Thomas Bordeaux.

Q. Your residence? A. Seattle, Washington.

Q. Are you at this time, temporarily stopping in Los Angeles, California? A. Yes, sir.

Q. What, if any, connection have you with the Mason County Logging Company, a corporation?

A. I am president and acting as manager.

Q. For what length of time have you been president and manager of Mason County Logging Company? A. Oh, since it was organized in 1892.

Q. Are you acquainted with J. A. Vance of Vance Lumber Company? A. Yes, sir.

Q. Are you acquainted with myself?

A. Yes, sir.

Q. How long have you known me?

A. Twenty or twenty-five years.

Q. State whether or not for a number of years last past I have been attorney for Mason County Logging Company.

A. Fifteen to twenty years anyway, fifteen years anyway.

Q. You are shown a paper marked Defendant's Identification 1. State, if you can, what it is. [2]

A. This letter was dated February 7th, 1922.

Q. Tell just what it is without reading the letter.

A. It is a letter wanting to know if I would be inerested in buying the Vance Lumber Company property.

Q. State whether or not you received that letter in the due course of the mail. A. Yes, sir.

Q. From whom did you receive it?

A. From W. H. Abel of Montesano, Washington.

Mr. ABEL.—We offer the letter as Defendant's Exhibit 1.

Mr. WALLACE.—May I ask the witness a question about the letter, Mr. Abel?

Mr. ABEL.—Yes, certainly.

Mr. WALLACE.—Q. Is that Mr. Abel's signature there, Mr. Bordeaux?

Mr. ABEL.—I object to that as not proper cross-examination, and I would say now that the person who signed my name will be produced as a witness, that person being Mrs. Lottie Fowler, my stenographer. Is that what you wanted to know?

Mr. WALLACE.—Yes.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 1 and is as follows:

DEFENDANT'S EXHIBIT No. 1.

"W. H. ABEL,

Attorney at Law,

Montesano, Washington. [3]

February 7th, 1922.

Thomas Bordeaux,

% Mason County Logging Co.,

1215 Alaska Building,

Seattle, Washington.

Dear Mr. Bordeaux:

You will recall that you spoke to me about getting an option upon the holdings of the Vance Lumber Company. Mr. Vance is willing to give such option, but does not appear to have decided on the price. He did talk as though it would be for around two million dollars and I told him that I thought it was entirely out of the question and if he did give an option he had better make it at the price at which he would actually sell. Owing to the Federal income tax law, he would prefer to make the price payable on installments.

If from this you think you would be interested, please let me know and I will take a written option for as long a time as I can get and at as low a price as he will quote and you can then make your investigation.

Yours very truly,

W. H. ABEL

F.

WHA°F."

Mr. ABEL.—Q. The witness is now shown Defendant's Identification 2 and asked to state what it is.

A. This letter is a letter in answer to yours of February 7, 1922. This letter is dated February 16, 1922. [4]

Q. Just tell whose letter it is.

A. This is my letter to Mr. Abel.

Q. State whether or not you sent that letter in due course of mail on or about February 16, 1922?

A. Yes, sir.

Q. Your attention is directed to the handwriting of four lines signed T. B. at the bottom of the letter. In whose writing is that?

A. That is my own writing.

Q. Was it on there at the time you sent the letter? A. Yes, sir.

Q. Your attention is directed to the initials T. B. Are those your initials? A. Yes, sir.

Q. Did you sign them there? A. Yes, sir.

Q. Your attention is directed to the words "Thomas Bordeaux, President." State whether or not that is your signature. A. Yes, sir.

Q. Written at the same time? A. Yes, sir.

Mr. ABEL.—We offer the letter as Defendant's Exhibit 2.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 2 and is as follows:

DEFENDANT'S EXHIBIT No. 2.

"MASON COUNTY LOGGING COMPANY,
Bordeaux, Washington.

February 16th, 1922. [5]

Mr. W. H. Abel, Attorney,
Montesano, Washington.

Dear Sir:

In answer to yours of the 7th inst. in regard to the Vance Lumber Company will say that we are interested in the letter but the first thing we ought to have is a list of all his property showing the valuation of the Mill, lumber stock on hand, number of acres of standing timber and description of same, and the number of acres of logged off lands. I think that you can perhaps get him to do this because it would be necessary for us to have it before we would go to the expense of examining the property.

Yours truly,
MASON COUNTY LOGGING COMPANY,
By THOMAS BORDEAUX,
President.

TB/B.

2 million seemed to be excessive although its all depend on the amount and acreage of the timber. Answer to Seattle office.—T. B."

Mr. ABEL.—Q. Your attention is now directed to a letter marked Defendant's Identification 3. State what it is.

A. It is a letter from you to me.

Q. When you say "from you to me" just give the names.

A. It is a letter from Mr. Abel to myself.

Q. State whether or not it was received by you in due course [6] of mail on or about the day it bears date? A. It was.

Q. You say the letter was a letter to you, it purports to be directed to Mason County Logging Co. care Thomas Bordeaux, a letter to your company you mean? A. Yes, sir.

Mr. ABEL.—We offer the letter as Defendant's Exhibit 3.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 3 and is as follows:

DEFENDANT'S EXHIBIT No. 3.

"W. H. ABEL,
Attorney at Law,
Montesano, Washington.

March 23rd, 1922.

Mason County Logging Co.,
% Thomas Bordeaux,
Alaska Building,
Seattle, Washington.

Dear Sirs:

I have a very general list of the assets of the Vance Lumber Company, with their estimated valuations thereof, and am enclosing copy of the same.

I can arrange, if you desire, a meeting with Mr. Vance to discuss the matter in detail and if you

then consider it advisable, obtain from him an option for a long enough period for you to make your examination.

Yours very truly,
W. H. ABEL.

WHA°F.
Encl." [7]

Q. Your attention is now directed to Defendant's Identification 4. State what it is.

A. It is a letter from W. H. Abel to myself.

Q. Pardon me, are you not misreading, you say it is a letter from W. H. Abel. State whether or not it is not a letter from you to W. H. Abel.

A. Oh, yes, that is right, from W. H. Abel to myself.

Q. Is that not misstated?

A. It is a letter from me to W. H. Abel.

Q. State whether or not it was sent in due course of mail on or about the day it bears date.

A. It was.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 4.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 4 and is as follows:

DEFENDANT'S EXHIBIT No. 4.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.
March 29th, 1922.

Mr. W. H. Abel,
Attorney,
Montesano, Wash.

Dear Sir:

I am in receipt of your favor of the 23rd inst. enclosing list of the assets of the Vance Lumber Co. and thank you for same.

I might say that at the present time we have a [8] much more attractive proposition, and are not as keenly interested in the Vance Lumber proposition. Thanking you for the work you have done in this line, I remain,

Yours very truly,
THOMAS BORDEAUX."

Mr. ABEL.—Q. You are now shown Defendant's Identification 5. State whether or not you have the original of which that purports to be a carbon. This letter is not important except as it happens to be in the chain of correspondence and the original seems to be missing. Did you receive such a letter on or about that date?

A. Yes, sir.

Q. This only purports to be a copy. Do you know where the original is?

A. I don't just know. The original must have been left in our office.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 5.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 5 and is as follows:

DEFENDANT'S EXHIBIT No. 5.

"June 20th, 1923.

Thomas Bordeaux,
1215 Alaska Bldg.,
Seattle, Washington.

My dear Mr. Bordeaux:

If you are in Grays Harbor County within the next week or two, would you please let me know. I would like to [9] get in touch with you. Otherwise I can meet you some time at Bordeaux, if you will let me know when you will be there.

Yours very truly,

WHA°F."

Mr. WALLACE.—We object to the introduction of Defendant's Exhibit 5 in evidence for the reason it has not been properly identified and appears to be a copy of a letter, the whereabouts of the original not having been fully explained. It is not the best evidence.

Mr. ABEL.—Your attention is now directed to Defendant's Identification 6. State what it is.

A. It is a letter from you to me.

Q. Who wrote that letter?

A. Oh, I wrote it myself, it is a letter from me to W. H. Abel at Montesano.

Q. Is that your signature to the letter?

A. Yes, sir.

Q. When did you send it? A. June 21, 1923.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 6.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 6 and is as follows:

DEFENDANT'S EXHIBIT No. 6.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

June 21st, 1923. [10]

Mr. W. H. Abel,
Montesano, Wash.

My dear Mr. Abel:

Yours of the 20th inst. at hand. I will be in Bordeaux on Wednesday of next week, and will be glad to see you then.

Yours very truly,
THOMAS BORDEAUX.

TB."

Mr. ABEL.—Q. Your attention is now directed to Defendant's Exhibit 6 which reads: "My dear Mr. Abel: Yours of the 20th inst. at hand." Referring back to Defendant's Exhibit 5 which purports to bear date June 20th, 1923, is that the letter that is referred to?

A. Yes, sir, that is the one.

Q. I direct your attention to Defendant's Identification 7 consisting of two sheets. State what it is.

A. This is a letter dated July 17th, 1923, from Mr. Abel to myself.

Q. State whether or not you received it in due course of mail on or about July 17th, 1923?

A. I did.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 7.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 7 and is as follows:

DEFENDANT'S EXHIBIT No. 7.

"W. H. ABEL,
Attorney at Law,
Montesano, Washington. [11]

July 17th, 1923.

Thomas Bordeaux,
1215 Alaska Bldg.,
Seattle, Washington,

My dear Mr. Bordeaux:

I had a talk with Harry Dollar, of Vance Lumber Company, and after he had talked matters over with Mr. Vance, said they were holding the property at $3,250,000. He says that same included the following:

Saw mill with a capacity of 140,000 feet per eight-hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. Newly completed installation of 1000 K. W. Gen-

eral Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodations for 100 people. 65 cottages for the accommodation of employees with families, pool-hall and picture show house.

The logging equipment consists of one 100-ton Baldwin rod engine (new), two Heisler geared locomotives, 17 donkey engines with necessary lines, blocks, etc., 2 steam shovels, 11 flat cars, 1 steel moving car, 3 oil tank cars, 42 connected logging trucks, 6 ballast cars, camp cars for two camp units and about 14 miles of standard guage railroad. Standing timber which will cut four hundred million, about 75 to 80% Fir, balance hemlock, spruce and cedar.

At this price he will give terms. [12]

Yours truly,

W. H. ABEL.

WHAF.

P. S.—I am informed there is about 500 million feet of timber tributary to the Vance Lumber Co. operation not in hands of operators.—W. H. A."

Mr. ABEL.—Q. Your attention is now directed to Defendant's Identification 8. State what it is.

A. This is a letter from me to Mr. W. H. Abel of Montesano.

Q. Of what date? A. July 28, 1923.

Q. State whether or not you sent that letter in due course of mail on or about that date?

A. Yes, sir.

Mr. ABEL.—Q. We offer the letter in evidence as Defendant's Exhibit 8.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 8 and is as follows:

DEFENDANT'S EXHIBIT No. 8.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

July 28, 1923.

Mr. W. H. Abel, Attorney,
Montesano, Washington.

My dear Mr. Abel:

Replying to yours of the 17th inst., I delayed answering same, for the reason that I wanted to see the principal owners of the lands along Porter Creek.

I finally met one last Thursday and he told me that [13] they have promised mostly all of his holding to a certain party who is now building a railroad to haul this timber to the Puget Sound country, so you can readily see that it will be hard to get much more timber there. However, I am willing to look into this proposition further.

If Mr. Vance would send me a map of his country showing his holdings, and also, who owns the adjoining lands, it would be some help to me to decide on this matter.

I finally located Mr. Vance' office here in the

Stuart Bldg., but I did not see him yet, but very likely will see him some day next week.

Yours truly,
THOMAS BORDEAUX.

TB:BC."

Mr. ABEL.—You are now shown Defendant's Identification 9 which purports to be a copy of a letter to Mason County Logging Co. bearing date July 27, 1923. State whether or not you received the original of which that purports to be a carbon copy.

A. Yes, sir, I have received this letter.

Q. Do you know where the original is at this time?

A. At this time it must be in our office either at Seattle or headquarters at Bordeaux.

Mr. ABEL.—We offer the carbon copy of letter in evidence as Defendant's Exhibit 9.

The carbon copy of letter referred to was thereupon marked by the notary public Defendant's Exhibit 9 and [14] is as follows:

DEFENDANT'S EXHIBIT No. 9.

"August 27th, 1923.

Mason County Logging Co.,
Bordeaux, Washington.

Dear Sirs:

The Vance Lumber Company herewith gives you an option, to be exercised within sixty days from this date, to purchase for the price of $3,250,000.00, its entire lumbering and logging properties, includ-

ing its saw mill, planing mill, shingle mills and all property appurtenant thereto; its office and store buildings, hotel, all of its cottages, pool hall, picture show house, including all of its timber properties, and all its logging railroad and all properties used in the operation thereof and in its logging operations.

All of this property is located at and near Malone, in Grays Harbor County, part of the timber being in Mason County.

Of the said price, $1,000,000 is to be cash payment, balance on agreed terms.

There are some matters of title and easements which will have to be adjusted, but a list of the lands, including the timber lands and also including the logged off lands are herewith submitted to you.

Yours truly,"

Mr. ABEL.—We will later undertake to supply further [15] information concerning the original.

Q. What is Defendant's Identification 10?

A. This is a letter dated September 11, 1923, from Mason County Logging Company by Thomas Bordeaux, President, to Mr. J. A. Vance at Malone, Washington.

Q. State whether or not you sent that letter in the usual course of mail on or about that date, September 11, 1923. A. We did.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 10.

The letter referred to was thereupon marked by the Notary Public Defendant's Exhibit 10 and is as follows:

DEFENDANT'S EXHIBIT No. 10.

"MASON COUNTY LOGGING COMPANY,
Bordeaux, Washington.

September 11, 1923.

Mr. J. A. Vance,
Malone, Washington.

Dear Sir:—

We have started to examine your property at Malone and have had four men examining your timber and logging conditions during the past week. They are still at your camp and yesterday my son, Ray and I met them at the camp and received our first report from them. Their investigation shows that the Mud Bay people can reach most all of the Porter creek timber so far as topography is concerned. This fact alone depreciates the value of your plant considerably, as it would be very good proposition for one concern only. But you cut [16] it in two it leaves it that neither party will make much out of it. In fact, we are now satisfied that you are asking away too much for your property, and unless you are willing to come down it is useless for us to spend more money in cruising your timber.

As for the mill you have a good townsite but it will take a lot of money to put the mill in good shape. We can see that you have spent a lot of money on the plant lately but it will take a lot more. It does not seem to us to be well suited for handling the big timber which you will get on Porter creek. Unless you are willing to re-con-

sider your price we will have to give the proposition up.

Yours truly,
MASON COUNTY LOGGING CO.,
By THOMAS BORDEAUX,
President.

TB/T."

Mr. ABEL.—The witness is now shown Defendant's Identification 11. State what it is.

A. This is a letter from myself signed as President of Mason County Logging Company to Mr. W. H. Abel, Montesano, Washington, dated September, 18th, 1923.

Q. State whether or not you sent that letter in due course of mail on or about that date?

A. Yes, sir, I did.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 11. [17]

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 11 and is as follows:

DEFENDANT'S EXHIBIT No. 11.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Sept. 18th, 1923.

Mr. W. H. Abel,
Attorney,
Montesano, Wash.

Dear Mr. Abel:

Re. our phone conversation last evening: I could

not very well get away today, owing to some previous engagement, but with regard to the Vance Lumber Co. option, will say that we have given this up.

We had four timber cruisers there for about ten days, and they reported that it would be a pretty good proposition if all of the timber tributary to Porter Creek could be secured. It would be one of the finest propositions in the Northwest, as the Porter Creek timber is first class with good ground for logging. It is too bad that Mr. Vance did not secure all of this timber a few years ago. But the Mud Bay Logging Co. in which the Weyerhaeuser people have large interests, having started in there, naturally control the Porter Creek country, and they are now building a railroad over the summit at the headwaters of Porter Creek. They will get over half of the timber in that district, so that it is cutting the proposition in two. You can readily see that there will not be much for either party. That is the reason why we have given it up. [18]

Yours very truly,
MASON COUNTY LOGGING CO.
By THOMAS BORDEAUX,
President."

Mr. ABEL.—Q. You are now shown Defendant's Identification 12. State what it is.

A. It is a letter from Mason County Logging Company signed by myself as President of the Company, to W. H. Abel, Montesano, Washington, dated Sept. 21st, 1923.

Q. State whether or not you sent that letter in due course of mail on or about that date?

A. Yes, sir, I did.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 12.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 12 and is as follows:

DEFENDANT'S EXHIBIT No. 12.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Sept. 21st, 1923.

Mr. W. H. Abel,
Montesano, Wash.

Dear Sir:—

In answer to yours of the 19th inst., will say that if Mr. Vance wants to sell his property, he will have to come down considerably on the price he is now asking, because, owing to the topography of that country, the Mud Bay Logging Co. will be able to get all of the Weyerhaeuser timber if they want it. I believe there is not much use [19] in your trying to get an option for anyone else, as Mr. Vance is asking too much, and it looks like he does not want to sell, unless he can get more than it is worth.

Yours very truly,
MASON COUNTY LOGGING CO.
By THOMAS BORDEAUX,
President."

Q. State whether or not Defendant's Identification 13 is a copy of an answer to Defendant's Exhibit 12 just introduced.

A. This letter is addressed to Mason County Logging Co. Seattle, Washington, dated September 22d, 1923.

Q. It only purports to be a copy. Did you receive the original from me of which that purports to be a copy? A. Yes, sir.

Q. Do you know where the original is now?

A. I am not certain where it is, it should be some place in our office.

Mr. ABEL.—In the absence of the original, however, I offer the copy which is marked Identification 13 in evidence, merely to complete the chain of correspondence. We will try to produce the original, but I do not know whether we can or not.

The copy of the letter referred to was thereupon marked by the notary public Defendant's Exhibit 13 and is as follows:

DEFENDANT'S EXHIBIT No. 13.

"September 22nd, 1923. [20]

Mason County Logging Co.
1215 Alaska Bldg.,
Seattle, Washington.

My dear Mr. Bordeaux:

In response to yours of the 21st inst. will say that I will try to see you in the next few days.

Yours very truly,

WHA°F."

Q. You are now shown Defendant's Identification 14. State what it is.

A. This is a letter from Mason County Logging Company signed by Thomas Bordeaux, President to W. H. Abel, Attorney, Montesano, Washington, dated October 4, 1923.

Q. State whether or not you sent that letter on that date in due course of the mail to me?

A. Yes, sir.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 14.

The letter referred to was thereupon marked by the notary public as Defendant's Exhibit 14 and is as follows:

DEFENDANT'S EXHIBIT No. 14.

"MASON COUNTY LOGGING COMPANY,
Bordeaux, Washington.

Oct. 4, 1923.

Mr. W. H. Abel, Atty.,
Montesano, Wash.

Dear Sir:

As I told you in Olympia I would see Mr. Long of the Weyerhaeuser people re. the Vance deal. Accordingly I stopped there last Monday but found that Mr. Long had gone east for two or three weeks, so I am unable to do [21] very much at present.

In the meantime I wish you would take it up with Vance again and have him come down on his price which is too high by six or seven hundred thousand dollars. It looks to me as though Mr.

Vance does not realize the position he is in just now. As you know the Mud Bay Logging Company has an option from the Weyerhaeuser people on the timber available in this section, so Mr. Vance cannot expect to get much more timber than he holds at the present time.

Yours very truly,
MASON COUNTY LOGGING COMPANY,
By THOMAS BORDEAUX,
President.''

Q. You are now shown Defendant's Identification 15 which purports to be a carbon copy of a letter. State whether or not you received the original in due course of mail on or about the day the copy bears date, from me. A. Yes, sir.

Q. You say you received the original?

A. Yes, sir, I received it.

Q. Do you know where it is at this time?

A. Just now it must be in—no I can't tell, it must be around the office.

Q. But you haven't it here personally at this time? A. No, sir. [22]

Q. Your attention is directed to the contents of Defendant's Identification 15 which mentions: "I am enclosing herewith the manufacturing report of Vance Lumber Company for the month of August, 1923, the sales report for the same month, manufacturing report for the first six months of this year and sales report for the same period.'' State whether or not you did receive those documents.

A. Yes, sir, I remember them.

Q. Do you know where they are at this time?

A. At this time I don't just know where they are, but I remember receiving them.

Q. You have not got them here? A. No, sir.

Mr. ABEL.—We offer the carbon copy of letter in evidence as Defendant's Exhibit 15.

The carbon copy of letter referred to was thereupon marked by the notary public Defendant's Exhibit 15 and is as follows:

DEFENDANT'S EXHIBIT No. 15.

"October 4th, 1923.

Thos. Bordeaux,
%Mason County Logging Co.,
Alaska, Bldg.,
Seattle, Washington.

My dear Mr. Bordeaux:

I had expected to hand you the enclosed statement at Seattle last Monday but was so busy in court that I did not have time to look you up, so I am enclosing herewith the [23] manufacturing report of Vance Lumber Co. for the month of August, 1923, the sales report for the same month, manufacturing report for the first six months of this year and sales report for the same period.

Please return to me when you are through with it.

Yours very truly,

WHA:F."

Q. You are now shown Defendant's Identification 16. State what it is.

A. This is a letter from Mason County Logging Company signed by Thomas Bordeaux, president, to

W. H. Abel, Attorney, Montesano, Washington, dated October 6th, 1923.

Q. State whether or not you received that letter in due course of mail on or about that date?

A. Yes, sir, I did.

Q. We offer the letter in evidence as Defendant's Exhibit 16.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 16 and is as follows:

DEFENDANT'S EXHIBIT No. 16.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Oct. 6th, 1923.

Mr. W. H. Abel,
Attorney,
Montesano, Wash.

Dear Sir:

I thank you very much for the information you have sent me, and I will look into the proposition further. Mr. Geo. Long is not back from the East yet, neither is Mr. [24] Draham.

In the meantime I wish you would take it up with Vance again and have him come down on his price, which is too high by several hundred thousand dollars.

It looks to me as though Mr. Vance does not realize the position he is in just now. As you know the Mud Bay Logging Co. has an option from the Weyerhaeuser people on all their timber in the

Porter Creek watershed, so Mr. Vance cannot expect to get much more timber than he holds at the present time. He seems to think that a good deal of the Weyerhaeuser timber cannot be reached by the Mud Bay Company; however, there is only a very small portion that they cannot reach, and Mr. Vance will no doubt have to trade in some of his present holdings to obtain this. The fact that he will not be able to buy much more timber materially depreciates the value of this mill, railroad, and in fact, his entire plant.

Yours truly,
MASON COUNTY LOGGING CO.
By THOMAS BORDEAUX,
President."

Q. Your attention is now directed to Defendant's Identification 17. State what it is.

A. This is a letter dated October 18, 1923, from Vance Lumber Company signed by J. A. Vance to Mason County Logging Co., Seattle, Washington.

Q. State whether or not the Mason County Logging Company received [25] that letter in the due course of mail on or about that date.

A. Yes, sir, we have.

Q. It purports to be an extension of the option referred to.

A. Yes, extension of time to purchase the holdings at Malone and vicinity.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 17.

The letter referred to was thereupon marked by

the notary public Defendant's Exhibit 17 and is as follows:

DEFENDANT'S EXHIBIT No. 17.

"W. H. ABEL,
Attorney at Law,
Montesano, Washington.

October 18th, 1923.

Mason County Logging Co.,
Alaska Bldg.,
Seattle, Washington.

Dear Sir:

Attention Mr. Thomas Bordeaux, President.

In response to your request for an extension of the option to purchase the holdings at Malone, and vicinity, of Vance Lumber Company, I hereby grant you an extension of thirty days from this date to complete the deal. This will give you ample time to complete your cruises and close the deal.

I wish it understood, however, that the shipments made pending these negotiations are for our account.

My suggestion to you is that you cruise the most remote timber first while the weather is fairly good.

Yours very truly,
VANCE LUMBER COMPANY,
By J. A. VANCE." [26]

Q. You are now shown two papers which purport to be duplicates each marked Defendant's Identification 18 and one thereof having a "1" above the 18, and at the bottom appearing "copy to W. H. Abel." State what those letters are.

A. It is a letter from Mason County Logging Company signed by Thomas Bordeaux, President, to Vance Lumber Company, Stuart Building, Seattle, Washington, dated October 19th, 1923, copy to W. H. Abel, Montesano.

Q. State whether or not the original thereof, that is, Defendant's Identification 18, was mailed in the due course of mail on or about the day it bears date to Vance Lumber Company? A. Yes, sir.

Q. And state whether or not the other copy, the one marked Defendant's Identification 18–1 was mailed on or about the date it bears date to myself?

A. Yes, sir.

Mr. ABEL.—We offer each thereof in evidence as Defendant's Exhibit 18 and 18–1.

The letters referred to were thereupon marked by the notary public Defendant's Exhibit 18 and Defendant's Exhibit 18–1 respectively and are as follows:

DEFENDANT'S EXHIBIT No. 18.

"MASON COUNTY LOGGING COMPANY,
1214 Alaska Building,
Seattle, Washington.

Oct. 19th, 1923.

Vance Lumber Co.,
Stuart Bldg.
Seattle, Wash. [27]

Dear Sir:

Attention Mr. J. A. Vance.

Replying to your letter of October 18th, 1923, in reference to our negotiations for the purchase by

Mason County Logging Company of all of your holdings at Malone and vicinity, we have to say:

It would not be possible for us to complete a cruise of your timber and close a deal within the time you mention.

We would be willing to take an option on your holdings on these terms:

We to have until January 1st, 1924, to make our cruise and to accept or reject the option; Purchase price to be $2,750,000.00. If we accept, we to assume indebtedness of yours to the amount of approximately $350,000.00, paying you in cash an amount to make, with such debts, the sum of One Million Dollars. The total consideration to be $2,750,000.00, and the balance of $1,750,000.00 to be secured by mortgage on property conveyed and to be paid in instalments of $400,000.00 to $500,000.00 per year with interest at 4% per annum;

Abstracts of title to all real estate to be submitted, upon notice of acceptance of the option, and a reasonable time allowed for examination. All titles to be good, merchantable titles. Deal to be closed upon approval of titles and making of first payment.

An early reply will oblige,

Yours very truly,

MASON COUNTY LOGGING CO.

By THOMAS BORDEAUX, President.

Copy to W. H. Abel, Montesano." [28]

DEFENDANT'S EXHIBIT No. 18-1.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Oct. 19th, 1923.

Vance Lumber Co.
Stuart Bldg.
Seattle, Wash.

Dear Sirs:

Attention Mr. J. A. Vance.

Replying to your letter of October 18th, 1923, in reference to our negotiations for the purchase by Mason County Logging Company of all of your holdings at Malone and vicinity, we have to say:

It would not be possible for us to complete a cruise of your timber and close a deal within the time you mention.

We would be willing to take an option on your holdings on these terms:

We to have until January 1st, 1924, to make our cruise and to accept or reject the option; Purchase price to be $2,750,000.00. If we accept, we to assume indebtedness of yours to the amount of approximately $350,000.00, paying you in cash an amount to make, with such debts, the sum of One Million Dollars. The total consideration to be $2,750,000.00, and the balance of $1,750,000.00 to be secured by mortgage on property conveyed and to be paid in instalments of $400,000.00 to $500,000.00 per year with interest at 4% per annum;

Abstracts of title to all real estate to be submitted, upon notice of acceptance of the option, and a reasonable time allowed for examination. All titles to be good, merchantable [29] titles. Deal to be closed upon approval of titles and making of first payment.

An early reply will oblige,

Yours very truly,

MASON COUNTY LOGGING CO.

By THOMAS BORDEAUX, President.

Copy to W. H. Abel, Montesano."

Mr. WALLACE.—What is the purpose of putting in duplicate?

Mr. ABEL.—Merely to show my connection with the matter, a copy was being sent to me, and one to the Vance Lumber Company.

Mr. WALLACE.—This was signed and sent at the time?

WITNESS.—Yes, sir.

Mr. ABEL.—Q. You are now shown Defendant's Identification 19. State what it is.

A. This letter is dated October 22d, 1923, from myself to W. H. Abel, attorney, Montesano, Washington.

Q. State whether or not you transmitted that letter by mail in due course on or about that date?

A. Yes, sir.

Mr. ABEL.—We offer the same in evidence as Defendant's Exhibit 19.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 19 and is as follows:

DEFENDANT'S EXHIBIT No. 19.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington. [30]

Oct. 22nd, 1923.

Mr. W. H. Abel,
Sttorney,
Montesano, Wash.

Dear Sir:

Referring to our telephone conversations of Saturday and this morning: With regard to the affidavit you ask for,—a couple of years ago we prepared a questionaire in which we gave the price of stumpage for the year 1913 and what it was at the time of preparing the questionaire, but as we keep all of our records at our head office at Bordeaux, I cannot answer your questions at this time. Am going to Bordeaux in a day or so, and you will hear again from me the latter part of the week.

With regard to the Vance deal: I talked to Mr. Vance by phone today, and he told me that he expected to go to Malone in a few days and would give us his answer from there. One thing that is important in regard to the plant, is the buying of the Puget Mill Co. lands, either for the Vance Lbr. Co. or for the Mason Co. Logging Co., if we buy Vance. I have an option on the Puget Mill timber until the first of November, and would like to hear

from you before that time, as I want to take advantage of my option from the Puget Mill.

Yours very truly,
THOMAS BORDEAUX.

TB."

Q. You are now shown Defendant's Identification 20. What is it?

A. This letter is dated October 30th, 1923, from Mason County [31] Logging Company, by Thomas Bordeaux, President, to Vance Lumber Company, Malone, Washington.

Q. State whether or not you sent that letter in the usual course of mail on or about that date?

A. Yes, sir, I did.

We offer the letter in evidence as Defendant's Exhibit 20.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 20 and is as follows:

DEFENDANT'S EXHIBIT No. 20.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Oct. 30th, 1923.

Vance Lumber Co.
Malone, Wash.
Dear Sir:

Attention Mr. Dollar.

This is to advise you that we are sending two timber cruisers tomorrow. They will arrive by

automobile, and I wish you would take them up on your logging train and hope you will be able to accommodate them at your camp for a few days.

Yours truly,

MASON COUNTY LOGGING CO.

By THOMAS BORDEAUX, President."

Q. You are now shown Defendant's Identification 21. Please state what it is.

A. It is a letter dated November 23d, 1923, from Mason County [32] Logging Company by Thomas Bordeaux, President, to W. H. Abel, Montesano, Washington.

Q. State whether or not you transmitted that letter by mail in the usual course on or about that date. A. Yes, sir.

Mr. ABEL.—We offer the letter in evidence as Defendant's Exhibit 21.

The letter referred to was thereupon marked by the notary public Defendant's Exhibit 21 and is as follows:

DEFENDANT'S EXHIBIT No. 21.

"MASON COUNTY LOGGING COMPANY,
1215 Alaska Building,
Seattle, Washington.

Nov. 23rd, 1923.

Mr. W. H. Abel,
Montesano, Wash.

Dear Mr. Abel:

This is to advise you that we have two sets of cruisers on Porter Creek examining the Vance Timber, and we find that this will not be completed

by the 1st of December. According to the option, we have until the 1st of December, or as long a time thereafter, as is needed, up to January 1st, 1924.

The way it looks now we believe it will take us until the 15th or 20th of December to complete the cruise.

Will you acknowledge receipt of this letter, and oblige,

Yours very truly,
MASON COUNTY LOGGING CO.
By THOMAS BORDEAUX, President."

[33]

Q. Mr. Bordeaux, what person, if anybody, interested you or Mason County Logging Company in the holdings of Vance Lumber Company?

A. It was yourself, W. H. Abel of Montesano.

Q. Did any other person, agent or attorney have anything to do with putting up the Vance Lumber Company's properties for sale to the Mason County Logging Company? A. Nobody else.

Q. How long had there been conversations or negotiations between yourself on the part of the Mason County Logging Company and me upon that subject, I mean the subject of the sale to Mason County Logging Company of the properties of Vance Lumber Company?

A. Oh, about two years or more, before the deal was closed, talking about it for a couple of years or more.

Q. During the time that Mason County Logging Company was dealing to buy the properties of

Vance Lumber Company, were you acquainted with R. M. Gaunt, the plaintiff in this case?

A. No, sir.

Q. Did you have any correspondence or dealings with her at all? A. No, sir, not at all.

Q. Did you know that R. M. Gaunt had the lumber company's properties for sale during the time that you were dealing? A. No, sir.

Q. Did you have any dealings concerning the Mason County Logging [34] Company purchasing the properties of the Vance Lumber Company with any other person at all except myself and J. A. Vance and H. D. Dollar?

A. Except stockholders.

Q. But as to outsiders?

A. No, no outsiders.

Q. Do you know Section 7 on Gibson Creek in Grays Harbor County, State of Washington?

A. Yes, sir.

Q. From whom, if anybody, did Mason County Logging Company buy that property?

A. From Anderson and Middleton, Aberdeen.

Q. About when was Section 7 bought by Mason County Logging Company from Anderson and Middleton?

A. Oh, during the first part of the year 1923, I don't remember what month it was, but early in the spring of 1923.

Q. What were the holdings of Vance Lumber Company with reference to the operations and property of Mason County Logging Company?

A. They were joined together, dovetailed together more or less.

Q. State whether or not during the entire two years that conversations and negotiations were pending, the Mason County Logging Company was interested in the purchase at a proper price of the properties of the Vance Lumber Company?

A. Yes, sir.

Q. And state whether or not during that entire time you understood [35] that I, W. H. Abel, was attorney for both companies, that is, Mason County Logging Company and Vance Lumber Company?

A. Yes, sir.

Mr. ABEL.—I think you may take the witness, Mr. Wallace.

Cross-examination.

(By Mr. WALLACE.)

Q. Mr. Bordeaux, you said you did not discuss it with anyone except the stockholders of Mason County Logging Company, what stockholders do you have reference to?

A. Stockholders of our company.

Q. Who were they that you have reference to?

A. My brother and Mrs. A. H. Anderson of Seattle.

Q. I believe you stated you were president and one of the trustees or directors of the Mason County Logging Company? A. Yes, sir.

Q. Who were the other trustees of the Mason County Logging Company?

A. My brother was one.

Q. What is your brother's name and initials?

A. Joseph.

Q. And who was the other trustee, if there were any others?

A. Well, M. E. Reed acting as trustee for Mrs. Anderson.

Q. That is Mark E. Reed of Sheldon?

A. Yes, sir.

Q. Did you ever discuss the proposition of buying the Vance [36] holdings with Mr. Reed, Mark E. Reed?

A. Not Mrs. Anderson, had some talk with him, I suppose.

Q. I am not asking you what you had with Mrs. Anderson, I am asking you now if you ever discussed it with Mr. Mark E. Reed?

A. I did, but whenever I talked to him about it he was opposed to it because Mr. Vance wanted too much money.

Q. When did you first talk to Mark E. Reed about the buying of Vance Lumber Company, or he talked to you about it, give us the date?

A. That was about the first of the year, 1924.

Q. The first of the year 1924? A. Yes, sir.

Q. You had never talked to him before that time about it or he to you?

A. Well, he is a pretty busy man.

Q. I understand that, but you can answer my question. Just state whether you did talk to him before the first part of the year 1924?

A. I don't exactly remember now whether I did or not.

Q. Well, you were contemplating buying property of the value of two and a half million to three and a half million dollars; now if you had talked with Mr. Reed would you not remember it?

Mr. ABEL.—I object to that as argumentative.

A. I had a talk with Mrs. Anderson several times about it. [37]

Q. When did you talk with Mrs. Anderson about it?

A. Oh, when we first commenced to talk about it a year or two.

Q. A year or two prior to the time you made the purchase? A. Yes, sir.

Q. But you say you never talked to Mr. Reed prior to the first of the year 1924 about the buying of the Vance timber.

A. Something might have been said before.

Q. How long before?

A. Oh, a few months before, I suppose.

Q. Did you talk to him about it in August, 1923?

Mr. ABEL.—I object to that as being immaterial, because this witness had negotiated for an option before that date with myself representing Vance Lumber Company.

Mr. WALLACE.—Q. Did you talk to Mr. Reed about buying the Vance Lumber Company in August, 1923?

A. Why, I don't exactly remember when I first talked with him about it.

Q. When you did first talk to Mr. Reed, what was said?

A. We talked about it in a general way, I told

him the price that Vance wanted, he said it was too much.

Q. Did you see Mark E. Reed on August 13th or 14th, 1923, in Seattle, Washington?

A. I see him quite often.

Q. Do you remember seeing him at that time?

A. No, sir.

Q. Do you remember the occasion when he delivered to you some [38] data and plats on the Vance holdings in August, about the middle of August, 1923?

Mr. ABEL.—I object to that as assuming alleged facts not shown to exist.

A. I do not remember receiving a plat, but I remember seeing it in the office, my son Ray called my attention to it.

Q. What office have you reference to?

A. Bordeaux office.

Q. Where? A. At Bordeaux, Washington.

Q. Do you remember that such a plat was delivered to you in the office of the Mason County Lumber Company in the Alaska Building in Seattle, Washington, during the month of August, 1923?

A. I don't remember.

Q. Do you say it was not so delivered to you by Mr. Reed? A. No, sir.

Q. Did I understand you to say that Mr. Reed was one of the directors of the Mason County Logging Company? A. Yes, sir.

Q. And represented Mrs. Anderson or the Anderson estate? A. Yes, sir.

Q. Mrs. Anderson was an owner of fifty per cent

of the stock of the Mason County Logging Company, was she not, Mr. Bordeaux? A. Yes, sir.

Q. Did Mr. Mark E. Reed own any stock?

A. No, sir. [39]

Q. How many shares of stock in the Mason County Logging Company did you own at the time?

A. Twenty-five per cent.

Q. You owned twenty-five per cent?

A. Yes, sir.

Q. Who owned the other twenty-five per cent?

A. My brother.

Q. Joseph Bordeaux? A. Yes, sir.

Q. Did you ever have any correspondence with Mr. Mark E. Reed about the purchase of the Vance Lumber and Timber Company holdings?

A. I don't remember any.

Q. If you had written Mr. Reed or he had written you about it, you would remember it, would you not, Mr. Bordeaux? A. Yes, sir.

Q. And you think now that no such correspondence ever took place between yourself and Mr. Reed?

A. It seems to me if I had written him a letter or gotten letters from him I would remember it, I don't remember any.

Q. You don't remember anything about it?

A. No, sir.

Q. Did you remember about the other letters that have been introduced in evidence here to-day?

A. Yes, sir.

Q. Do you know a man by the name of Watson?

A. Watson of Tacoma?

Q. Yes. A. I have met him. [40]

Q. Do you know what his initials are?

A. No, I can't tell you now.

Q. How long have you been acquainted with Mr. Watson?

A. Oh, I am not much acquainted with him, been in the office different times for the last four or five years, I suppose he has been in about half a dozen times.

Q. I think there is no question, Mr. Bordeaux, but what you and I are thinking of the same Mr. Watson, I don't seem to have his initials.

A. I don't remember his initials.

Q. He lives in Tacoma and is connected with the Standard Mines Company? A. I don't know.

Q. And is engaged in selling real estate occasionally? A. Timber broker.

Q. Do you recall Mr. Watson coming to your office about February 20th, 1924? Do you remember that time? A. In 1924?

Q. Yes.

A. Why, I don't remember now, but he has dropped in different times.

Q. Do you remember Mr. Watson asking you for the maps and plats that he had turned over to you belonging to Miss R. M. Gaunt?

A. I don't remember that, no.

Q. Do you remember saying to him about that time that those [41] plats were down at the camp and that you would bring them up when you went down and let him have them?

A. I don't remember.

Q. You say you did not make any such statement? A. What is that?

Q. Do you now say that you never had any such conversation with Mr. Watson?

A. Oh, Mr. Watson came in to tell me some of his troubles.

Q. I am not asking you about that; I am simply asking you this very plain question; did he come in and ask you for the maps which belonged to Miss Gaunt, R. M. Gaunt?

A. I don't remember him coming in there and asking for maps, he was in there talking about a deal, talking about this woman in Tacoma having an option on that piece of property, I told him I didn't know anything about it.

Q. Did you tell him you had the maps down at the camp and you would bring them up?

A. I don't remember.

Q. Did you have those plats down at the camp?

A. I remember seeing them there.

Q. So you did have them there?

Mr. ABEL.—You speak of "them"; is there more than one?

Mr. WALLACE.—There is a plat and description and letter. I am speaking of a plat of the timber and the description of it. I am asking Mr. Bordeaux if he had [42] those down at the camp.

Mr. ABEL.—Then when you speak of those you mean a plat and a description of the property?

Mr. WALLACE.—Yes, I mean the plat and a description of the property that was turned over to

Mr. Bordeaux by Mark E. Reed after he had secured them from Miss Gaunt.

A. Why, I told him before that I didn't remember, I don't know. I know my son showed it to me at Bordeaux, whether it was mailed to me or brought up there I don't remember now.

Q. Do you remember about the 5th day of March, 1924, Mr. Watson calling at your office in Seattle and asking you if you brought up the maps and you promised to bring them, do you remember that?

A. No, sir.

Mr. ABEL.—None of this is material, except so far as it goes to the point of whether he ever had them, and I object to it as incompetent, irrelevant and immaterial, and not cross-examination.

Mr. WALLACE.—Do you remember saying to Mr. Watson at that time that you had forgotten to bring them up, that you were going down shortly afterwards and would bring them?

A. I don't remember that.

Q. Then do you remember saying to Mr. Watson at that time that you had forgotten to bring them up and you would go down in a couple of weeks to the camp again and that you [43] would bring them up?

A. I don't remember anything about Watson talking maps to me.

Q. Do you say that he did not talk about the maps to you?

A. I don't say he did not, I say I don't remember anything about it.

Q. Do you say you don't know how that map got down to your office? A. No, sir.

Q. That is, the office at Bordeaux?

A. No, sir.

Q. Do you know where it is now? A. No, sir.

Q. Did you take it down there?

A. I told you before I didn't remember about the maps.

Q. Did you ever have it?

A. I remember seeing it in the office at Bordeaux, that is all.

Q. Do you remember when that was?

A. No, sir.

Q. Do you remember having a conversation with Mr. Watson in the office of the Mason County Lumber Company in Seattle about the 20th day of August, 1923, with reference to your deal with Mr. Watson on some timber lands just north of Astoria?

Mr. ABEL.—Objected to as immaterial.

Mr. WALLACE.—It is just for the purpose of fixing the time.

A. I don't remember the dates, no. I remember he spoke to me about some timber in Oregon, I think it was. [44]

Q. Do you remember saying to him at that time that you had just found out that Vance wanted to sell his timber and that you were not interested further in his tract down near Astoria?

Mr. ABEL.—Object to that as incompetent, irrelevant and immaterial.

A. I don't remember anything like that.

Mr. WALLACE.—Q. You say you did not have any such conversation, or you simply do not remember it?

A. I remember the conversation in a general way. He wanted to get me interested in Oregon, some Oregon timber, but what was said about it I don't remember.

Q. Do you remember saying to him at that time that you never knew before that Vance wanted to sell his timber?

Mr. ABEL.—Objected to as incompetent, irrelevant and immaterial.

Mr. WALLACE.—Q. Would you say you did not say it?

A. I don't remember that.

Q. You have no recollection about that?

A. No, sir.

Q. And that you said at that time that if you had known that Vance wanted to sell his timber you would not have been interested in Mr. Watson's proposition? A. I don't remember.

Q. Did you not say to Mr. Watson at that time that the Vance tract was just the tract of timber that you wanted, that [45] it was close, that you knew all about that kind of timber there, that you were not interested in any other?

A. I don't remember talking to Watson about the Vance property at all.

Q. Did you and the other directors of the Mason County Logging Company ever have a meeting with reference to the buying of the Vance Lumber Company's holdings? A. No, sir.

Q. Did Mark E. Reed ever consent to the buying of the Vance Lumber Company's holdings as a trustee of the Mason County Logging Company?

A. Well, he was opposed to buying it, he thought the price was too high.

Q. Was that the only objection he had to buying it, otherwise he consented?

A. Well, he said something about making Mrs. Anderson agree to it, it would be all right with him.

Q. Was it necessary for them to agree to it before you could buy it?

Mr. ABEL.—That is a conclusion of law as to whether the consent of the stockholders was necessary, and I object to it on that ground.

WITNESS.—What was the question?

(Question read: "Was it necessary for them to agree to it before you could buy it?")

Mr. WALLACE.—Q. When I say "them" I mean Mrs. Anderson [46] and Mark E. Reed, before you could buy it?

Mr. ABEL.—That is a conclusion of law, and I object to it, it is not calling for anything but an opinion on a legal question.

A. It was agreed amongst ourselves to buy it, yes.

Q. Was it necessary to have their consent before you could buy it?

A. Had to have it, they owned half the stock.

Q. You would not have bought it without the consent of Mrs. Anderson, would you?

A. No, sir.

Q. Who was represented by Mr. Mark E. Reed?

A. Some time he was, some time he was not.

Q. In so far as her interest in the Mason County Logging Company was concerned, Mark E. Reed represented her on the board of directors, didn't he? A. Yes, sir.

Q. And it was necessary to get Mark E. Reed's consent as such trustee to buy such property, was it not?

Mr. ABEL.—I object to this as not cross-examination of anything developed on direct examination.

Mr. WALLACE.—Q. Is that true, Mr. Bordeaux?

A. No, sir.

Q. Now, Mr. Bordeaux, calling your attention to Defendant's Exhibit 1, do you have any distinct recollection of ever having received that letter at the time it was written, [47] or shortly after?

A. I remember—I might have had lots of correspondence, but this particular one I must have received it.

Q. What is there about it that makes you think you received it?

A. The same thing about all those letters.

Q. I am not asking you that, I am asking you what it is about Defendant's Exhibit 1 that makes you think you received it?

A. Because it is one of the first correspondence that we had.

Q. Now, when you got that letter did you take it up with Mr. Mark E. Reed, discuss it with him?

A. No, sir.

Q. When you wrote Defendant's Exhibit 2 in answer to Exhibit 1, had you talked with Mr. Reed about buying the Vance timber? A. No, sir.

Mr. ABEL.—Object to this as not cross-examination, and to shorten up you might ask him just when he did first talk to Reed about it and see whether it was your client that arranged it or not.

Mr. WALLACE.—Q. Now, Mr. Bordeaux, prior to receiving Mr. Abel's letter, Defendant's Exhibit 7, dated July 17th, 1923, had you talked to Mr. Reed about the purchase of the Vance timber, Mr. Mark E. Reed?

A. Why, I remember during the fall of 1923 of talking with him about it in a general way. [48]

Q. Consulting with him about the purchase?

A. Well, I just said that we talked in a general way about it.

Q. What did you say about it to Mr. Reed or he to you?

A. I cannot recall just what we said, we talked about the matter, that ought to cover the ground.

Q. When you say you talked about the matter, you mean you talked about the purchase of the Vance Lumber Company holdings? A. Yes, sir.

Q. And that is the first time that you ever talked with him, was in the fall of 1923 about it?

A. Yes, sir.

Q. Did you have frequent conversations with him about it? A. No, sir.

Q. How many times did you talk with Mr. Reed about it in the fall of 1923?

A. I don't remember exactly how many times,

perhaps three or four times in the fall until the deal was closed.

Q. And you had talked to him about it prior to the time mentioned in Defendant's Exhibit 9; you had talked to Mr. Reed prior to taking the option on August 27th, 1923, Defendant's Exhibit 9, had you not? A. Prior to August, 1923, you say?

Q. Yes, August 27th.

A. It seems to me it was later than that we first talked about it.

Q. You agreed on the terms of this before you took this option, did you not? A. No, sir. [49]

Q. You had not? A. No, sir.

Q. Your recollection is that you never talked to Mr. Reed about it or wrote to him about it or he to you in the month of August, 1923, I mean about the buying of the Vance Lumber Company's holdings?

A. I remember never was any letter written, no correspondence about it.

Q. You are positive of that?

A. As far as I can remember. No, I do not remember having written any letters.

Mr. ABEL.—That covers not merely letters, but talk with Reed?

A. Just talk.

Mr. WALLACE.—Just talk, no letters?

A. No letters.

Mr. WALLACE.—That is all.

Redirect Examination.

(By Mr. ABEL.)

Q. Your brother Joseph is dead, is he not?

A. Yes, sir.

Q. When did he die? A. Last September.

Q. Then during the period in controversy here, the Board of Directors of Mason County Logging Company was yourself, your brother Joseph Bordeaux and Mark E. Reed? A. Yes, sir.

Q. Mark E. Reed had no stock in the company, but was the [50] representative of Mrs. Anderson, who owned half the stock of the company?

A. Yes, sir.

Q. State whether or not you were the active manager operating the company? A. I am.

Q. And you had been all the years of the organization, had you?

A. Yes, sir, for thirty-five years, I guess.

Q. When you obtained the option on the Vance Lumber Company's properties on or about August 27th, 1923, had you had any previous talk or dealings with Mr. Reed at all about your getting that option? A. What date was that?

Q. The date of the option August 27, 1923.

A. Round or about that time I think it was the first time that we had it up or talked about it.

Mr. ABEL.—I think that is all.

Recross-examination.

(By Mr. WALLACE.)

Q. And it was as a result of that talk that the option was taken, was it not, Mr. Bordeaux?

A. Very likely it was, I don't know now.

Q. You would not have purchased for the Mason County Logging Company, you and your brother as

trustees, these Vance holdings, over the objection of Mark E. Reed, would you, and against his wish?

A. No, sir.

Mr. ABEL.—Can we waive Mr. Bordeaux' signature? [51]

Mr. WALLACE.—Yes, I think so; it will be all right.

—————————. [52]

State of California,
City and County of San Francisco,—ss.

I, Laura E. Hughes, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn and authorized to administer oaths, etc., do hereby certify that on the 14th day of December, 1925, at the hour of two o'clock P. M. there personally appeared before me, as such notary public, Thomas Bordeaux, a witness produced for and on behalf of defendant in the foregoing entitled action, in the City of San Francisco, State of California, at the office of W. F. Humphrey; that said Thomas Bordeaux was first duly sworn to testify before being examined by counsel for defendant and counsel for plaintiff upon oral interrogatories; that such deposition was taken in shorthand by me, the said Laura E. Hughes, a stenographer, and by me reduced to typewriting; that the foregoing transcript is a true and correct transcript of the testimony of said witness.

I further certify that Defendant's Exhibits 1 to 21, each inclusive, are the only exhibits offered in evidence in connection with the testimony of such

witness, which exhibits are made a part of his testimony and the foregoing deposition.

WITNESS my hand and seal this 14th day of December, 1925.

[Seal] LAURA E. HUGHES,

Notary Public in and for the City and County of San Francisco, State of California. [53]

[Endorsed]: No. 5636. United States Circuit Court of Appeals for the Ninth Circuit. Carrie Gaunt, as Executrix of the Estate of Ruby M. Gaunt, Deceased, Appellant, vs. Vance Lumber Company, a Corporation, Appellee. Supplemental Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed November 23, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased,

Appellant,

—vs.—

VANCE LUMBER COMPANY, a corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

B. S. GROSSCUP,
W. C. MORROW,
CHAS. A. WALLACE,
Counsel for Appellant.

Seattle, Washington.

THE ARGUS, SEATTLE

FILED
FEB 7 - 19[illegible]
PAUL P. O'BRIEN,

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THE ARGUS, SEATTLE

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United States
Circuit Court of Appeals
For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased, *Appellant,* —vs.— VANCE LUMBER COMPANY, a corporation, *Appellee.*	No. 5636

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF OF APPELLANT

ABSTRACT STATEMENT OF THE CASE

Ruby M. Gaunt, a commission broker, brought this action in the United States District Court for the Western District of Washington by bill of complaint to reform a written memorandum signed by the appellee, Vance Lumber Company, by which she was employed to sell certain lands described on a plat accompanying and referred to in said memorandum, and also a logging railroad with its equipment and an operating lumber manufacturing plant the defend-

ant owned in Sections 10, 16 and 17, Township 17 North, Range 5 West, W. M., described in the memorandum:

> "The property consists of saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. We have just recently completed the installation of a 100 K.W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodations for 100 people, 65 cottages for the accommodation of employees with families, pool hall and picture show house."

The memorandum in connection with the plat referred to describes specifically a portion of the land covered by the commission contract and in addition, by reference to fixed structures, the operating property consisting of real estate and machinery. The complaint alleges that it was the intention of the defendant to employ the complainant to sell the land specifically described and in addition the land embraced in the operating plant and the machinery, railroad and other personal property. It is alleged that in drawing the memorandum, through inadvertence, fraud or mistake, a specific description of the land connected with its logging and lumbering operations was omitted.

The answer does not deny that the parties intended to enter into an enforcible contract and it does not

deny that the defendant intended to sell and intended to employ the complainant to sell the operating property which included the land occupied by the described buildings and their surroundings connected with and incident to the prosecution of the business.

But the answer alleges, that the description of that part of the operating plant which consisted of land is defective; that the language employed in attempting to describe this operating property by reason of vagueness brings the whole memorandum within the condemnation of the Washington statute of frauds.

The complaint prayed for a reformation of the written memorandum signed by the defendant by supplementing the general description of the operating property with a particular and specific description thereof. The court below denied reformation and after holding that the memorandum signed by the defendant is void at law dismissed the complaint. This appeal is prosecuted to reverse that order, to remand the case to the District Court for reformation of the signed memorandum, and thereafter to enter judgment affording such relief as the complainant is entitled to.

Before the hearing in the District Court, Ruby M. Gaunt, the complainant, deceased, and the case was revived in the name of Carrie Gaunt as executrix of the estate of Ruby M. Gaunt, who is appellant in this court.

In this brief for convenience the appellant's testate is designated "broker" and the appellee, the defendant in the court below, as the "Company".

ASSIGNMENTS OF ERROR

The appellant relies upon each and all of the following assignments of error:

I.

The Court committed error in finding that the testimony in said cause did not show and establish fraud in the execution of the contract sued upon in said cause.

II.

The Court was in error in finding that the testimony in said cause did not show mutual mistake in the execution of the contract sued upon in said cause.

III.

The Court erred in finding that under the testimony in said cause said contract so sued upon in the bill of complaint was within the statute of frauds of the State of Washington and therefore void and unenforcible.

IV.

The Court erred in entering a decree dismissing plaintiff's cause of action.

STATEMENT OF THE EVIDENCE

Prior to February, 1922, the Company had acquired fifteen to twenty sections of timber lands in substantially one body in Grays Harbor and Thurston Counties; had acquired in the vicinity of Malone in Grays Harbor County a mill site, and had built thereon a mill and lumber manufacturing plant, office buildings, hotel, dry kilns, store building, sixty-five cottages for the accommodation of employees' families, pool hall and

picture show house (R. 85), all of which buildings were located in Sections 10, 16 and 17, Township 17, North of Range 5 West, W. M. (R. 19); also about fourteen miles of standard guage railroad with rolling stock and equipment. The plant was equipped with machinery appropriate to the manufacturing of lumber.

About eighteen months prior to the events involved in this litigation W. H. Abel, who had been "intimately associated with the Vance Lumber Company," as its attorney, had sat in on the original purchase when it bought the mill site, and at all times thereafter, and was familiar with the Company's plans with reference to a sale of the property, began negotiations for the sale of the Company's properties through Thomas Bordeaux to the Mason County Logging Company (R. 71). These negotiations with Mr. Abel in behalf of the Company were continued until the sale of the property to the Mason County Logging Company in January, 1924, but no substantial progress was made before August, 1923, when negotiations resulted in an option on August 28, 1923, to the Mason County Logging Company for the purchase of its property (R. 118). This option was consummated by a contract of sale to the Mason County Logging Company January 9, 1924 (R. 20, 86-114).

While these negotiations of Abel with the Mason County Logging Company were in progress the broker and Vance, president of the Company, met in Seattle June 16, 1923. Previously on May 12, 1923, broker and Isaac A. Wilson, had seen Harry B. Dollar at the plant at Malone. Mr. Dollar was the local manager

of the property and one of the directors. He stated that on account of Mr. Vance's illness the Company wanted to dispose of the property. Dollar showed the broker and Wilson the buildings and gave them a list of the equipment (R. 64). During this visit Dollar was asked for a plat describing the Company's holdings offered for sale, which he agreed to furnish. Vance says, referring to the broker's conversation with him in Seattle,

> "I knew at that time that she (referring to the broker) was after a contract for the sale of all our timber and our mill and everything we owned over there, and I talked to Mr. Dollar about it and then as a result of that talk it is a fact that Mr. Dollar wrote that letter to her on July 5, 1923. And at that time I intended to withhold a part of these lands. I intended to hold the logged-off lands, the farm land, the Garden Tracts and the Elma Yard." (R. 70)

As a result of these negotiations between the broker and Mr. Dollar and conferences between Dollar and Vance, the Company mailed to the broker a letter bearing date July 5, 1923, set out in full as Exhibit No. 1 (R. 85 and 86). Mr. Dollar says:

> "The document shown me, Plaintiff's Exhibit No. 1, is a letter I wrote to Miss Gaunt on July 5, 1923. I enclosed a plat with that letter. Plaintiff's Exhibit No. 2 is the plat that was enclosed with the letter." (R. 56)

The original plat has been certified to this court as Exhibit No. 2. The writing at the top in ink and the "W.M." was not put on by Mr. Dollar. All other

writing was put on by Dollar including the colored sections (R. 56). By coloring the sections to be included in a prospective sale, the Company definitely indicated the timber land intended to be sold. Mr. Dollar was asked:

> "Q. Did you intend at that time to sell all of the property that the Vance Lumber Company owned and held, both real and personal— A. No. * * * What properties did you intend to exclude from that sale? A. All the logged-off lands." (R. 58 and 59)

Mr. Vance has described these logged-off lands as being in Sections 2 and 4, Township 17 North, Range 5, Section 32, in Township 18 North, Range 5, and some in Section 26, Township 18 North, Range 5; "Roughly speaking there were about ten or twelve hundred acres logged-off land" (R. 69). The Company's answer says:

> "That it also owned land in Sections 10, 16, 17, Township 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, is situated." (R. 19)

The Company knew the description of said property and clearly intended to include in the commission contract all of its real and personal property constituting the operating plant.

The Company in a letter to the broker on August 15, 1923, says:

> "As we are giving an option on the property that we offered for sale, please do not do any-

> thing further with this until you hear from us again." (R. 117)

This option included all the property except a small tract at Elma which was put into the contract with the Mason County Logging Company a few days before the consummation of that contract. All the land covered by the option and in addition thereto, the Elma yard, put in a few days before the final contract, are described in the final contract entered into, set out in full on pages 86 to 99 of the Record. This contract signed by the Company gives a specific conveyancer's description of the lands in Sections 10, 16 and 17, on which the plant, consisting of the mill and other real estate fixtures were located (R. 88-93 inc.).

Mr. Abel, under whose direction and intimate counsel the defendant was acting, referring to the plat, Exhibit No. 2, made by reference a part of the letter, Exhibit No. 1, said:

> "There is no description whatever of the millsite, which is the most valuable land of all. Q. That was part of the property that was to be sold? A. Yes. Q. And then there were some buildings adjoining for the occupancy of the employees? A. Yes. Q. Is that land described on this plat? A. Not at all. There were some sixty-two houses, I believe, besides the store buildings and theatre. Q. Those lands were entirely omitted? A. Yes; no description in the plat or otherwise in any writing whatever." (R. 75)

The description in the memorandum signed by the Company, Exhibit No. 1 (R. 85), says:

"Referring to our former correspondence regarding a description and price on our holdings we beg to submit the following.

"The property consists of saw mill with a capacity of 140,000 feet per eight hour day, blacksmith and machine shops. Planing mill with necessary dry kilns and dry lumber sheds. Two shingle mills with dry kilns. We have just recently completed the installation of a 1000 K.W. General Electric Company turbine with necessary motors for supplying power for the above properties. Office and store building with stock of merchandise, hotel with accommodations for 100 people, 65 cottages for the accommodation of employees with families, pool hall and picture show house."

The Company does not deny in its answer and admits by its testimony, that the property covered by the foregoing description was, in addition to the timber lands described on the plat, Exhibit No. 2, intended to be sold.

It interposes the defense that no enforcible contract existed because of the defective description of the land on which these buildings stood, and constituted the operating plant.

"This defendant admits that on the 5th day of July, 1923, and at all times thereafter up to and including the 9th day of January, 1924, it was the owner of certain timber, timber and logged-off lands, sawmill, planing mill, shingle mills, dry kilns, dry lumber sheds, office and store buildings, stock of merchandise, hotel, about sixty-five

cottages, pool hall and picture show house." (R. 17)

"That was part of the property that was to be sold? A. Yes." (R. 75)

"The logged-off lands were included in the option to Mason County Logging Company." (R. 76)

Now, referring to testimony of Dollar,

"Did you intend at the time" (July 5th, when Exhibit No. 1 was written), "to sell all of the property that the Vance Lumber Company owned and held, both real and personal— A. No." (R. 58) "What properties did you intend to exclude from that sale? A. All the logged-off land." (R. 59)

Vance says the logged-off lands were in Sections 2 and 4, Township 17, Range 5, and Sections 32 and 26, Township 18, Range 5. These were the lands included in the option to the Mason County Logging Company, but omitted from Exhibit No. 2. The Company "owned land in Sections 10, 16, 17, Township 17 North, Range 5 West, where the mill, office buildings, hotel, cottages and other buildings in the town of Malone, Washington, is situated" (R. 19). The lands in those sections, intended to be included in the broker's authority to sell, are specifically described in Exhibit No. 3 (final contract of sale) on pages 88 to 93 inclusive of the Record. It was clearly the understanding of both the broker and the Company that the broker should have for sale under her contract these lands on which the buildings stood, in addition to the timber lands described on the plat, Exhibit

No. 2. The ommission of the kind of description which the Washington law, as interpreted by its Supreme Court, requires was through a mistake of the Company in drawing the memorandum and of the broker in accepting it in reliance upon the Company's good faith to furnish her a signed memorandum in legal and enforcible form. If there was no mistake as to the legal effect of the descriptive language used in the memorandum by the Company in making the draft, but on the other hand the language employed was intentionally used so that the broker could not collect for her services to be rendered, the Company was guilty of a fraud.

On August 9th the broker wrote to the Company:

> "I have this day submitted your timber and mill property at Malone, to Mark E. Reed of the Simpson Logging Company, and his associates, for their consideration." (Exhibit No. 9, R. 122)

The Company on August 15th wrote:

> "As we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us again." (Exhibit No. 5, R. 117)

By this letter the Company recognized the existing contract with the broker. The word "further" shows that it recognized that she had been acting under it in her negotiations with Reed and his associates, and that she was to retain her employment and be available for further assistance upon request.

The option was not consummated until August 28th (Exhibit No. 6. R. 118). The negotiations with the

broker's customer from the date of this letter, August 15th, were conducted wholly by the Company.

We have in this record a complete description sufficient for conveyancing of all the land the broker had a contract to sell. These descriptions were all identified by the signature of the Company by signed documents and references to enclosed plats made a part of the signed documents.

The complaint alleges that the broker after receiving this letter of July 5th, 1923, and acting upon the written assurance of compensation therein contained, immediately set about to secure a purchaser and the complaint alleges that she did secure as a purchaser and was instrumental in consummating a sale to Mason County Logging Company on terms and conditions satisfactory to the Company.

The complaint seeks the preliminary remedy in equity of reformation of the contract evidenced by the letter of July 5, Exhibit No. 1. The statute of Washington (Remington's Comp. Stat. §5825) provides that a contract for a commission for the sale of real estate is void unless the contract or some memorandum thereof is signed by the party to be charged. In numerous law cases the Supreme Court of Washington has held that there can be no recovery by a real estate broker unless the memorandum contains a full and exact description sufficient to constitute a conveyance, if it were a deed. No case has been cited in the lower court or in the Court's opinion where the claimant has sought as a preliminary remedy, reformation of the contract on the ground of fraud or mistake in the drafting of the memorandum.

Before starting to take evidence, the District Court ruled,

> "This is an action to reform a written contract of employment, which is clearly equitable, and for a decree enforcing said contract." (R. 54)
>
> "I am just taking from both of you that we are simply trying to reform a contract here." (R. 55)

And after the complainant had rested, and before the defendant began to submit its evidence, the court said:

> "I understood yesterday that you were simply proceeding to see whether this contract should be reformed. * * * That is all I want to dispose of now. * * * Just to reform. (R. 66) We will proceed and see whether the contract ought to be reformed. * * * I will determine this upon this reformation feature now." (R. 67)

During the progress of the trial while defendant was putting in its evidence, objection was made to evidence offered on the ground that it was not pertinent to the issue as to whether the contract should be reformed, but went to the question of whether the broker was the procuring cause in bringing about a sale. The court said:

> "I think, in the first place, the court must determine whether there is a contract before it can be reformed. I am not going to sit here simply as a bump on a log to see if something shall be done for which there is no basis. The first thing I want to know is whether there is a contract, and then whether it is to be reformed." (R. 72)

At the conclusion of the evidence on the subject of reformation, the court announced orally—

> "The Court cannot now make a contract for these parties. It would be to defeat the very purpose of the statute of frauds of this state, and the laws of this state control the parties as to this suit and limit and define their interest in the matter in issue. The petition for reformation will therefore be denied." (R. 82-83)

ARGUMENT

The District Court erred:

In applying principles of law enunciated in law actions construing the Statute of Washington:

Remington's Compiled Statutes, §5825:

> "In the following cases specified in this section any agreement, contract, and promise shall be void unless such agreement, contract or promise or some note or memorandum thereof be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized, that is to say: * * *
>
> "5. An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission."

The District Court further erred:

In applying to a case for reformation the federal rules and principles of equity applicable to a case for specific performance.

The District Court further erred:

In holding that a writing signed by the party to be charged, which through mistake or fraud contains

defective description of the land constituting the subject matter of the commission contract, cannot be reformed by supplying an accurate description and thereby making the contract enforcible at law.

The District Court further erred:

In failing to find that the minds of the parties met upon an agreement which, through mutual mistake of the parties or fraud of the Company, failed to express in such form and with such fullness as the statute requires to make a contract enforcible at law.

A state by statute or decision cannot impair or limit the jurisdiction of Federal Equity courts where uniform principles of equity will be applied in all the states

Reformation being within the jurisdiction of equity, defined by English practice when the Federal constitution was adopted, authorizing Congress to create Federal Courts with jurisdiction at law and in equity, and Congress having conferred upon Federal courts complete equity powers within their jurisdiction over the parties, no state can by legislation or by judicial interpretation of legislation deprive a Federal Court of its full powers to administer equitable remedies. A state law cannot impair the law of the land. In a controversy between citizens of different states a litigant in a Federal Court is entitled to the application of principles established by Federal equity courts.

> "The jurisdiction of the courts of the United States, sitting in equity cannot be controlled by the laws of the States or the decisions of the state courts."
>
> Story's Equity Jurisprudence, 14th Ed. §58.

"State laws subtracting from or limiting the scope of equity do not act upon the equitable powers and jurisdiction held by the national courts."

Pomeroy's Equity Jurisprudence, 4th Ed. §293.

In *Pratt v. Northam*, 5 Mason, 95, Justice Story thus stated the general doctrine:

"It has been often decided by the Supreme Court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states and is the same which is exercised in the land of our ancestors from whose jurisprudence our own is derived."

"The Circuit Courts of the Union have chancery jurisdiction in every state; they have the same chancery powers, and the same rules of decision in all the states."

United States v. Howland and Allen, 4 Wheaton 108.

Suits in equity shall be "according to the principles, rules and usages which belong to courts of equity, as contra-distinguished from the courts of common law."

Robinson v. Campbell, 3 Wheaton 211, 220.

The Statute of Frauds is no bar to reformation

The plea of the statute of frauds in bar of a claim arising out of a contract as understood by both parties, but not expressed in the written memorandum thereof, in language, required by the statute, after the

parties have entered on performance of the contract as understood, is in itself a fraud. Such a plea is unconscionable and will not be tolerated by a Federal Court of equity.

" 'The distinct ground upon which courts of equity interfere in cases of this sort is, that otherwise one party would be enabled to practice a fraud upon the other; and it could never be the intention of the statute to enable any party to commit such a fraud with impunity. Indeed, fraud in all cases constitutes an answer to the most solemn acts and conveyances, and the objects of the statute are promoted, instead of being obstructed, by such a jurisdiction for discovery and relief. And where one party has executed his part of the agreement, in the confidence that the other party would do the same, it is obvious, if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice.' 1 Story's Eq. Jur., §§754, 759.

This rule finds illustration in cases in this court; in *Neale v. Neales*, 9 Wall. 1, 9, where it was said that 'the statute of frauds requires a contract concerning real estate to be in writing, but courts of equity, whether wisely or not it is too late now to inquire, have stepped in and relaxed the ribidity of this rule, and hold that a part performance removes the bar of the statute, on the ground that it is a fraud for the vendor to insist on the absence of a written instrument, when he had permitted the contract to be partly executed.' * * *

And in *Townsend v. Vanderwerker*, 160 U. S. 171, 184, where it was said that 'the general principle to be extracted from the authorities is that if the plaintiff, with the knowledge and consent of the promisor, does acts pursuant to and in obvious reliance upon a verbal agreement, which so changed the relations of the parties as to render a restoration of their former condition impracticable, it is a virtual fraud upon the part of the promisor to set up the statute in defence, and thus to receive to himself the benefit of the acts done by the plaintiff, while the latter is left to the chance of a suit at law for the reimbursement of his outlays, or to an action upon a *quantum meruit* for the value of his services.' 'Courts of equity,' said Lord Cottenham, 'exercise their jurisdiction in decreeing specific performance of verbal agreements, where there has been part performance, for the purpose of preventing the great injustice which would arise from permitting a party to escape from the engagements he has entered into, upon the ground of the Statute of Frauds, after the other party to the contract has, upon the faith of such engagement, expended his money or otherwise acted in execution of the agreement. Under such circumstances, the court will struggle to prevent such injustice from being effected; and, with that object, it has, at the hearing, when the plaintiff has failed to establish the precise terms of the agreement, endeavored to collect, if it can, what the terms of it really were.'"

Whitney v. Hay, 181 U. S. 77, 89.

> "The principle is unalterably fixed in the foundations of the jurisprudence that equity will not suffer a statute passed for the purpose of preventing fraud to be used as an instrument for accomplishing fraud; the statute will be uplifted, when necessary to prevent such a result."
>
> Pomeroy's Eq. Jur., 4th Ed., p. 1783 note.

Fraud and mistake are alike in their effect upon the injured party. It is the purpose of reformation to relieve the injured party. There is therefore no difference in the remedy applied for correcting an instrument wrongly drafted through mistake or wrongly drafted through fraud. For this reason

> "We find judges constantly describing the conduct of persons in such a situation, who insist upon holding the advantages accidentally obtained by mistake, as fraudulent, and the persons themselves as guilty, from a moral point of view, of virtual, if not actual, fraud."
>
> Pomeroy's Eq. Jur., 4th Ed., p. 1782 note.

Washington Supreme Court decisions have no bearing on the issue before this court

The District Judge cited many Washington decisions in support of his opinion denying reformation. The decisions referred to lay down rules for the construction of the statute applicable to a real estate commission contract. These decisions hold that before there can be a recovery at law or a decree for specific performance the real estate must be as accurately described as in a deed of conveyance. These de-

cisions further hold that the court in law actions cannot resort to parol evidence to cure defects and uncertainties in the description. The fundamental error of the district court is the application of these decisions to a reformation case, the purpose of which is to correct the contract sued upon so that in its corrected form it will constitute the basis for damages or specific performance.

If Washington could make a rule of procedure and evidence in a case within federal equity jurisdiction, each other state could make a rule different from each other, and thus destroy the principle of uniformity throughout the Union.

Reformation on the ground of fraud and mistake is a remedy brought from the jurisprudence of England.

> "The doctrine in all its breadth and force is maintained by courts and jurists of the highest ability and authority, which hold that, whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject matter which had been omitted through the fraud or mistake, and that he may then obtain a specific performance of the contract thus varied, and such relief may be granted although the agreement is one which by the statute of frauds is required to be in writing."

Pomeroy's Eq. Jur., 4th Ed., §866.

The cases cited by the learned author abundantly sustain the text. The early New York decisions cited were rendered during the infancy of American equity jurisprudence.

The state decisions go to the construction of the statute and to the application of the statute as construed to the written contract in the form and substance before the court. These decisions have no bearing on the right of reformation, by means of which the signed memorandum before the court will be in its corrected form sufficient to constitute the basis of recovery.

> *American Merchant Marine Ins. Co. v. Tremaine*, 269 Fed. 376.

The District Court misapplied the principles on which some federal cases were decided

The District Court says, "The state statute as construed and applied by the highest court of the state, I think is practically uniformly applied in the federal courts." There is no argument against this proposition, but it is inapplicable. The contract, not as it is written but as it may be reformed by decree of this court, will then be construed and applied according to the state law. But the preliminary right of reformation, so that the contract shall stand clothed with all essentials under the state law, is a fundamental right having its basis in conscience and fair dealing.

The statute of frauds has its basis in policy. The exercise of equity power is based upon a higher law.

It is needless to say that an equity court will not give life to a transaction prohibited by law, but it

may give life to a lawful transaction which has been through mistake expressed in language which makes the real agreement unenforcible.

Parol evidence is competent

Fraud and mistake, being the basis of reformation, are proved in the same way. To hold that a writing in a reformation case cannot be varied, curtailed, supplemented or explained by parol evidence, would be to destroy the whole principle of reformation, the purpose of which is to correct a written instrument by changing it so as to conform to the real agreement of the parties.

In a law action or specific performance action without allegation of fraud or mutual mistake as a basis for reformation, the contract speaks for itself. It is held to express that which the parties intended, but in an equity action to reform on the ground of fraud or mistake it is permissible to show by parol that the contract sued upon was not the entire contract of the parties. An action to reform, based on fraud or mistake by omission from the writing of part of the subject matter of the actual contract, could never be sustained without supplying the omission by parol evidence. Since the right to reform has become firmly grounded in English and American jurisprudence, it must follow that parol evidence, the only kind of evidence which can accomplish the purpose, is competent and will, where such parol evidence clearly establishes fraud or mistake, sustain a decree of reformation.

> "The court of equity has, from a very early period, decided that even an act of Parliament

shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an act of Parliament intervenes, the court of equity, it is true, does not set aside the act of Parliament, but it fastens on the individual who gets a title under that act, and imposes upon him a personal obligation, because he applies the act as an instrument for accomplishing a fraud. In this way the court of equity has dealt with the statute of wills and the statute of frauds."

McCormick v. Grogan, L. R. 4 H. L. 82, 97.

"If the general doctrine of the law" (relating to the effect of parol evidence on written instruments) "or the statute of frauds was regarded as closing the door against such evidence, the injured party would be without any certain remedy, and fraud and injustice would be successful."

Pomeroy's Eq. Jur., 4th Ed., §859.

While written collateral documents signed by the party to be charged are very helpful to the court in deciding cases for reformation, such evidence is not necessary to enable the court to pass a reformatory decree.

"Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong."

2 Pomeroy's Eq. Jur., 4th Ed., §858.

The signed memorandum imports a clear agreement, the subject matter of which is certain. All it lacks is amplification by incorporating descriptive language to put it in enforcible form

The Company clearly intended to sell and intended

to make a binding contract with the broker that she should sell on commission the lands indicated on the plat, Exhibit No. 2, and the lands on which stood the real estate fixtures described, being the saw mill, theatre, hotel, dry kilns, cottages, etc., constituting the operating plant. A description of these lands which constituted the operating plant is definitely ascertainable by connecting together documents signed by the Company with only such explanations as show their connection with the document sought to be reformed.

> *Beckwith v. Talbot*, 95 U. S. 289;
> *Ryan v. United States*, 136 U. S. 68.

It may be conceded that the evidence does not show clearly that the logged-off lands owned by the Company were connected with the logging and lumbering operations of the Company, but the complaint alleges:

> "That at the time the defendant delivered said memorandum of agreement to this complainant it represented to her that the said memorandum contained a description of all its said property then owned by it in Grays Harbor and Thurston Counties, *in connection with its said logging and lumbering operations.*"

This complainant believed and relied upon the representation of the defendant, so made to her, and acted thereon and procured the Mason County Logging Company to buy and the Mason County Logging Company did buy all of defendant's said property (R. 13).

It is then alleged that there was mistake in the draft of the paper by the failure of the Company to

include a specific description of the land constituting a part of its logging and lumbering operations, and that this mistake of the Company resulted in a written document on its face unenforcible at law, whereas it was the clear intention that the contract should be enforcible at law.

The correction of the written document sought in this case is to incorporate a sufficient description of the operating property including real estate which the evidence shows the Company intended to sell, and for procuring a purchaser for that property it agreed to pay a commission.

The prayer is for reformation of the written contract of employment of July 5, 1923 (Exhibits Nos. 1 and 2), by including therein a description of the property omitted, particularly the property described in paragraph V of this bill (R. 12-15). The property described in paragraph V is the land in connection with "its said logging and lumbering operations."

The defendant contends that some of the lands described in the bill (the logged-off lands) were not a part of the operating plant. There is no contention that any land which was not used "in connection with its said logging and lumbering operations" should be included in a reformatory decree. The bill described specifically all the land which the Company owned and in effect alleges that there should be selected out of those descriptions and incorporated in the contract only the land marked on Plat, Exhibit No. 2, and the land connected with and constituting the operating plant.

Equity will correct the defective description if the omission was the result of a mistake of law as to its sufficiency in the form it was signed and accepted

Equity will not by reformation convert an agreement forbidden by law into a valid agreement by changing its terms, but where such agreement is expressed in insufficient language to enable them to prove their actual agreement, equity will reform their written expression of the actual agreement, even though such correction involves a mistake as to the legal sufficiency of the words employed to express the actual and legal intention of the parties.

In *Griswold v. Hazard*, 141 U. S. 260, 284, it is said:

> "While it is laid down that 'a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts,' yet 'the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best-considered and best-reasoned cases upon this point, both English and American.' *Snell v. Insurance Co.*, 98 U. S. 85, 90, 92; 1 Story Eq. Jur. §138 e and f, Redf. ed.; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 48; *Underwood v. Brockman*, 4 Dana, 309, 316; *Jones v. Clifford*, 3 Ch. D. 779, 791, 792; *Canedy v. Marcy*, 15 Gray, 373, 377; *Green v. Morris & Essex Railroad Co.*, 1 Beasley, 165, 170; *Beardsley v.*

Knight, 10 Vermont, 185, 190; *State v. Paup*, 13 Arkansas 129; 2 Leading Cases in Eq. pt. 1, 979 to 984; 2 Pomeroy's Eq. §§843 to 847."

To the same effect, *MacKay v. Smith*, 27 Wash. 442, 446, in which is quoted with approval Kerr, Fraud & Mistake, p. 399 note:

> "Where the legal principle is confessedly doubtful and one about which ignorance may well be supposed to exist, a person, acting under a misapprehension of the law, will not forfeit any of his legal rights by reason of such mistake."

These cases go to the point that mistake as to legal sufficiency is not to be assigned to negligence. The ordinary presumption that the parties know the law does not apply in a case where the law is doubtful.

Without a knowledge of the Washington decisions relating to these commission contracts a person, even a lawyer, when applying the principle, "that that is certain which can be made certain", and the further principle that all collateral documents signed by the party to be charged, with only such oral explanation as is necessary to connect these documents together and show the circumstances under which they were signed, might conclude that the memorandum, Exhibits Nos. 1 and 2, would constitute a good contract at law.

Berry v. Coombs, 1 Peters 636, 649.

Where a written contract is drawn and executed that professes or is intended to carry into execution an agreement previously made in writing or by parol, but by mistake of the draftsman either as to fact or

law the contract as written does not fulfill or violate the manifest intention of the parties, equity will grant reformation so as to conform the writing to the agreement, especially where the writing by omission is defective.

Medical Society v. Gilbreth, 208 Fed. 899.

Where the writing is so worded as not to give legal effect to the intention of the parties, it will be reformed.

Thompson v. Phenix Ins. Co., 136 U. S. 287, 296.

> " 'In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties.' 1 Story, Eq. Jur., p. 164. And Lord Hardwicke remarked in *Henkle v. Royal Exchange Assur. Co.*, 1 Ves. Sr. 317, 'No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified.' * * *
>
> "These principles have become elementary, and it is needless to refer to further authorities to sustain them."

Justice Nelson in *Bradford v. The Union Bank of Tennessee*, 13 Howard 56, 66.

The Company delivered to the broker a signed memorandum pointing out in general words the prop-

erty constituting the operating plant. In the preparation of this memorandum by the Company it is presumed that it intended to legally bind itself to pay the stipulated commission. If the memorandum drawn by the Company and accepted by the broker, through mutual mistake as to its legal sufficiency and completeness, omitted a description of the land in conveyancing language, and if by reason of such omission the paper was not a valid contract at law, this federal court by reformation has power to supply the omitted description, and thereby make the paper a valid and enforcible contract as the parties intended it should be. This principle will be applied even though the Company wrote, and the broker accepted, the writing under the mistaken belief that the document, as written, was sufficient in law to constitute a valid contract. This principle is especially applicable where the document is drawn by the party intending to be bound.

> "In short, if a written instrument fails to express the intention which the parties had in making the contract which it purports to contain, equity will grant its relief, affirmative or defensive, although the failure may have resulted from a mistake as to the legal meaning and *operation* of the terms or language employed in the writing."
>
> Pomeroy's Eq. Jur., 4th Ed., §845.

"Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the

ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party."

Pomeroy's Eq. Jur., 4th Ed., §847.

"It is well settled that courts of equity will reform a written contract where, owing to mutual mistake, the language used therein did not fully or accurately express the agreement and intention of the parties. The fact that interpretation or construction of a contract presents a question of law and that, therefore, the mistake was one of law is not a bar to granting relief. *Snell v. Insurance Co.*, 98 U. S. 85, 88-91; *Griswold v. Hazard*, 141 U. S. 260, 283-284."

Justice Brandeis in *Philippine Sugar &c Co. v. Philippine Islands*, 247 U. S. 385, 389.

The signed memorandum (Exhibit No. 1, R. 85) is not a complete statement of the contract actually entered into, in that the writing does not contain, through mutual mistake or fraud of the Company, a description of part of the land in such form as the Washington statute, as interpreted by the Washing-

ton Supreme Court, requires to make a real estate commission contract enforcible at law. To make the memorandum a binding contract at law it is necessary by reformation to incorporate in conveyancing language a description of the property which the parties by their actual mutual understanding intended to cover.

Rogers v. Lippy, 99 Wash. 312.

But through mutual mistake as to the legal sufficiency in law of the signed paper, by which the Company intended to express its intention to be charged, the paper on its face is a nullity in law. The Company's refusal to comply with its agreement on the ground that it misled, intentionally or mistakenly, the broker into accepting a worthless piece of paper is not consistent with fair dealing.

The minds of the parties met on the actual contract intended to be embraced in the memorandum

The lower court erred in not finding that the minds of the parties met.

The final contract of sale of the Company's property in Grays Harbor and Thurston Counties (Exhibit No. 3, R. 86) describes all the Company's property in those counties. The Elma yard included therein the Company did not intend to sell when it made the arrangement with the broker. The logged-off lands the Company did not intend to sell when it made the arrangement with the broker. The Elma yard and the logged-off lands described by Vance are not in Sections 10, 16 and 17. Clearly the property

the parties intended to cover was all the land indicated on the plat, Exhibit No. 2, and all the land owned by the Company in Sections 10, 16 and 17, Township 17 North, of Range 5 West, W. M. The buildings described in the signed memorandum occupied the lands owned by the Company in these sections (Answer, R. 19).

When the hearing in the court below came on the broker had deceased. Her representative was dependent upon witnesses who had an adverse interest. These witnesses, Dollar, Abel and Vance, all agreed that all the property except the property described by Vance as logged-off lands (R. 69) and the Elma yard was for sale and intended to be covered by the broker's employment. An attempt to describe it is manifest from the memorandum itself. This memorandum was accepted by the broker and acted upon by her.

There is no uncertainty as to the land which was in contemplation. The defect in the memorandum is in the failure to employ descriptive language sufficient to clothe the paper in such terms as the statute of Washington, as interpreted by the decisions of the Supreme Court, requires. The property intended to be described is certain; the terms of employment are certain. When this certainty has been injected into the paper by reformation we will have the binding contract the parties intended to make.

The District Court erred in holding that reformation would be an idle act

The complaint alleges that the broker relying on

her commission contract, which implies reliance on its legal sufficiency, "acted thereon and procured the Mason County Logging Company to buy and the Mason County Logging Company did buy all the defendant's said property."

The issue tendered by this allegation and denied by the Company in its answer has not been tried. The court properly proceeded with the issue of reformation. Having found against the broker on that issue, there was nothing to try. Under the holding of the District Court, without reformation the signed memorandum cannot be enforced. It was contended in the lower court, and we anticipate it will be contended here, that the record clearly shows that the price finally agreed upon between the Company and the purchaser was less than the price named in the signed memorandum. When the case comes to be tried on its merits, the basis for recovery will be the reformed contract and the law of Washington, as interpreted by its Supreme Court, will be applicable to the plaintiff's right to recovery with the same effect as if the reformed contract constituted the memorandum signed by the party to be charged. It will appear that after the broker by letter notified the Company that she had "submitted your timber and mill property at Malone to Mark E. Reed and his associates", the defendant took upon itself the further negotiations of a contract for sale and requested the broker "not to do anything further with this until you hear from us again". All subsequent negotiations were carried on by the Company direct with the assistance of its attorney, W. H.

Abel. Under these circumstances final reduction in price will not constitute a defense.

Duncan v. Parker, 81 Wash. 340;
Godefroy v. Hupp, 93 Wash. 371.

Applying these cases where the price was reduced by the Company without consulting the broker, it was held that the incorporation into the sale of additional land does not defeat the broker of commission.

Miller v. Brown, 115 Wash. 177, 180.

All of these issues, after the contract has been put in enforcible form by reformation will be tried out according to the usual procedure.

Respectfully submitted,

B. S. Grosscup,
W. C. Morrow,
Chas. A. Wallace,
Counsel for Appellant.

Seattle, Washington.

No. 5636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,

Appellee.

Appellee's Answer Brief

Appeal from the United States District Court for the Western District of Washington, Northern Division.

HON. JEREMIAH NETERER, *Judge*

W. H. ABEL, and
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Appellee.

Postoffice Address:
W. H. ABEL, Montesano, Wash.
POE, FALKNOR, FALKNOR & EMORY,
977 Dexter Horton Bldg.,
Seattle, Washington.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,

Appellee.

APPELLEE'S STATEMENT OF THE CASE

The suit was brought by R. M. Gaunt to reform, and enforce, a broker's contract for commission for sale of lands and personal property for a single, undivided consideration. Judge Neterer tried the case below and decided that there was no mistake, nor fraud; that the minds of the parties never met as to the identity of the property to be sold; that equity would not construct a contract for the parties; that the contract was void under the Washington statute of frauds; that it could not be reformed upon parol testimony, and that another agent made the sale.

By falsely representing that she had a buyer who was represented by one Wilson, Gaunt obtained a letter promising her a commission of two per cent if she made a sale. Wilson did not represent a purchaser, but was a broker associated with Gaunt. Wilson testified he was to have 10% of the commission. (Tr. 64.)

Undisputed testimony by Dollar shows this false representation. (Tr. 60.) It is supported by Gaunt's letter to Dollar, Defendant's Ex. A-4 (Tr. 132), where she said "Then Mr. Wilson can submit it to his people and take them to see the property."

Induced by this pretext, the letter on which suit is based, was written July 5, 1923. It does not describe the lands at all. The letter is Exhibit 1. (Tr. 85-6.)

August 9th, 1923 (Plaintiff's Ex. 9, Tr. 122), Miss Gaunt wrote Vance Lumber Company:

> "I have this day submitted your timber and mill property at Malone, to **Mark E. Reed of the Simpson Logging Company**, and **his associates**, for their consideration.
>
> "He wrote me that they would give this proposition their consideration if I would send plat and data which you gave to me. Owing to the financial responsibility of these parties whom I know are amply able to handle a property like yours, I trust this will meet with your approval——"

The liability to pay commission is predicated on this submission of a plat to Mark E. Reed of Simpson Logging Company. Reed submitted the plat to Mason County Logging Company, who was not interested therein, because it already had the information, and was dealing to buy the property through another agent, W. H. Abel. Vance Lumber Company was never informed that Reed submitted the plat to Mason County Logging Company.

This appellee introduced the testimony of J. A. Vance and H. B. Dollar that Vance Lumber Company was dealing to sell the property to Mason County Logging Company before and during the whole period that Gaunt was trying to sell it to another; that maps and data had been furnished to the president and manager of Mason County Logging Company; the deposition of Thomas Bordeaux, president, and C. R. Bordeaux, manager of Mason County Logging Company, showed that their company was dealing to buy the property, not through Gaunt, but through W. H. Abel; that they never met Gaunt, knew nothing about her, did not become interested in the property through her. The deposition of Thomas Bordeaux contains all the correspondence on the subject, including letters written before Gaunt was employed as broker.

The appellant had no witnesses to establish mistake, except Vance and Dollar, who denied there was

any mistake. Appellant relies on cases of reformation of deeds, or executory contracts of sale, where, by mutual mistake, lands were erroneously described; the erroneous description being complete in itself. Here we are dealing with a contract which never was complete.

Under a different statute of frauds, it is the rule in the State of Washington that part performance may be shown in aid of a parol contract sought to be specifically enforced, but that rule has been expressly held not to apply to cases under Rem. Comp. St., section 5825, which includes brokers' contracts for commissions.

Am. Mer. Marine Ins. Co. v. Tremaine, 269 Fed 376, arose under the insurance code of Washington, and it was held that the statute did not prevent reformation for mistake. No question of statute of frauds is involved. The decision by Judge Neterer in the lower court found against appellant on the facts and on every question of law raised. The decree appealed from is supported by the clear weight of all the testimony. Indeed there are no disputed questions of fact.

AUTHORITIES

I. Equity will not enforce a contract obtained by fraud, subterfuge or imposition.

Pope Mfg. Co. v. Gormully, 144 U. S. 238;

Cathcart v. Robinson, 5 Pet. 264;

Grieson v. Winey, 240 Fed. 691 (8 C. C. A.);

Pomeroy, Spec. Performance (3rd ed.), Sec. 183.

II. Equity will not make contracts for parties; nor supply essential missing terms; incomplete contracts are not specifically enforceable.

N. W. L. Co. v. Ry. Co., 221 Fed. 807;

Hackley v. Oakford, 98 Fed. 781 (3rd C. C. A.);

Pomeroy, Spec. Per. (3rd ed.), Sec. 145.

III. In order that a writing by relation may be used in aid of a contract required by the statute of frauds to be in writing, the relation or connection must appear on their face. There must be either an express reference to each other or internal evidence of their unity, relation or connection.

Broadway v. Decker, 47 Wash. 586;

Gilman v. Brunton, 94 Wash. 5;

Nance v. Valentine, 99 Wash. 325;

12 Enc. Ev. 18;

27 C. J. 262.

IV. The jurisdiction of the federal courts in equity are not impaired by state statutes which create substantive rights.

Brine v. Hartford F. Ins., 96 U. S. 627;

Union National Bank v. Bank, 136 U. S. 223;
1 Pomeroy, Eq. Jur. (4th ed.), Sec. 299.

V. Federal courts of equity give effect to state statutes of fraud, as construed by the highest courts of the several states.

Brashear v. West, 7 Pet. 608;
Lloyd v. Fulton, 91 U. S. 487;
Massey v. Allen, 17 Wall. 354;
Robinson v. Belt, 187 U. S. 43;
Andrews v. Youngstown, 39 Fed. 353;
Walker v. Hafer, 170 Fed. 37 (6 C. C. A.);
Beckwith v. Clark, 188 Fed. 171 (8 C. C. A.).

VI. Federal equity courts follow the law, and will not enforce void contracts.

Hedges v. Dixon, 150 U. S. 182;
Magniac v. Thomson, 15 How. 282;
West v. Camden, 135 U. S. 507;
Clark v. Smith, 13 Pet. 195;
East Central v. Central Eureka, 204 U. S. 266;
In re Pacific El. & Auto Co., 224 Fed. 220.

VII. State equity courts follow the law and will not enforce void contracts.

Reed v. Johnson, 27 Wash. 42;
Cascade v. Railsback, 59 Wash. 379;
Delbridge v. Beach, 66 Wash. 416.

VIII. The Washington statute, Rem. Comp. St., Sec. 5825, subd. 5, makes void a broker's contract to buy or sell land which is not in writing, and signed by the party to be charged therewith, or his agent duly authorized. The entire statute reads (italics ours):

> "In the following cases, specified in this section, any agreement, **contract** and promise **shall be void**, unless such agreement, **contract** or promise, or some note or memorandum thereof, **be in writing**, and **signed** by the **party to be charged therewith**, or by some person thereunto by him lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) Every special promise to answer for the debt, default, or misdoings of another person; (3) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry; (4) Every special promise made by an executor or administrator to answer damages out of his own estate; (5) **An agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.**"

IX. A broker's contract to sell lands and personal property, which fails to sufficiently describe the lands, is entirely void.

> Thompson v. English, 76 Wash. 23;
>
> Cushing v. Monarch Timber Co., 75 Wash. 684;
>
> Rogers v. Lippy, 99 Wash. 312;
>
> Big Four Land Co. v. Daracunas, 111 Wash. 224;

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Nance v. Valentine, 99 Wash. 323;

Engleson v. Port Crescent Shingle Co., 74 Wash. 424;

Black v. Milliken, 143 Wash. 204;

Farley v. Fair, 144 Wash. 101;

Campbell v. Weston, 87 Wash. 73;

Coleman v. St. Paul, 110 Wash. 273.

X. A contract, insufficient under the statute of frauds, will not be reformed upon parol testimony.

Mead v. White, 53 Wash. 638;

McCrae v. Ogden, 54 Wash. 521;

2 Story, Eq. Jur. (13th ed.), Sec. 770-a.

XI. Part performance or full performance will not aid a broker's contract for commission, void under the statute of frauds.

Keith v. Smith, 46 Wash. 131;

Cushing v. Monarch Timber Co., 75 Wash. 687;

Thill v. Johnson, 60 Wash. 393.

XII. In order to entitle a broker to a commission, he must be the procuring cause of the sale.

Frink v. Gilbert, 53 Wash. 392;

Bagley v. Foley, 82 Wash. 222;

Dore v. Jones, 70 Wash. 157;
Bleiweiss v. McCurdy, 106 Wash. 419;
Fawkner v. Rio Negro, 104 Wash. 571;
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Neeley v. Lewis, 38 Wash. 20;
Blackwood v. Ballard, 83 Wash. 405;
Hayden v. Ashley, 86 Wash. 653;
Antill v. Lorah, 118 Wash. 680.

XIII. A broker does not earn a commission where the principal makes a sale himself.

Sunnyside v. Bernier, 119 Wash. 386;
Hammond v. Mau, 69 Wash. 204;
Elson v. Sanders, 121 Wash. 391;
Fawkner v. Rio Negro, 104 Wash. 57;
Taylor v. Maddux, 4 F. 2d 447.

GAUNT NOT PROCURING CAUSE

That Miss Gaunt did not aid in making the sale is clearly established. All she did was to mail to Mark E. Reed, of Simpson Logging Company, an incomplete plat partly describing the lands. There is nothing to show that she knew Reed was trustee of Mason County Logging Company, and Reed did not inform her that he sent the plat to Mason County Logging Company nor was Vance Lumber Company so informed.

Long before the plat was sent to Reed, or by him to Mason County Logging Company, negotiations had been started and were pending to sell the property to Mason County Logging Company. W. H. Abel who was attorney for both companies was actively engaged in carrying on these negotiations and, as Judge Neterer decided, made the sale and received a commission for doing so. Abel had furnished maps and data before Miss Gaunt sent the plat to Reed, and the parties were dealing every few days. The chain of correspondence is in the deposition of Thomas Bordeaux, which by order of Judge Neterer, was included as an exhibit. These letters show a continuous negotiation dating from before Gaunt had anything to do with the transaction, and continuing to a sale months later. These letters are:

Feb. 7, 1922. Abel to Thomas Bordeaux.

Feb. 16, 1922. Mason County Log. Co. to Abel (asking for list of property, number of acres, standing timber, description, etc.).

Mar. 23, 1922. Abel to Mason County Log. Co.

June 20, 1923. Abel to Thomas Bordeaux (about meeting).

June 21, 1923. Thomas Bordeaux to Abel (about meeting next week).

July 17, 1923. Abel to Bordeaux (about price).

July 18, 1923. Bordeaux to Abel (asking for maps).

Aug. 27, 1923. Option given.

Sept. 18, 1923. Mason County Log. Co. to Abel (showing it had started to examine property).

Sept. 21, 1923. Mason County Log. Co. to Abel (discussing properties and price).

Sept. 22, 1923. Abel to Bordeaux (about meeting).

Oct. 4, 1923. Mason County Log. Co. to Abel (discussing price).

Oct. 4, 1923. Abel to Mason County Log. Co. (submitting manufacturing report and sales report).

Oct. 6, 1923. Mason County Log. Co. to Abel (discussing price and asking reduction).

Oct. 18, 1923. Vance Lumber Co. to Mason County Log. Co. (extending option for 30 days).

Oct. 19, 1923. Mason County Log. Co. to Vance (discussing price, terms and title).

Oct. 26, 1923. Bordeaux to Abel (discussing price and other property).

Oct. 30, 1923. Mason County Log. Co. to Vance (gives notice sending cruisers).

Nov. 3, 1923. Mason County Log. Co. to Abel (notice regarding cruisers asking extension to Jan. 1).

Thomas Bordeaux testified that W. H. Abel interested Mason County Logging Co. in the property; that nobody else interested it. They had been having conversation with Abel on the subject for about two years or more before the deal was closed; that Mason County Logging Co. was not acquainted with R. M. Gaunt; had no correspondence or dealings with her; did not know she had the properties for sale and did not deal with any other person except Abel, Vance and Dollar. During the entire time, Abel was attorney for Vance Lumber Company and Mason County Logging Company.

On cross-examination, Thomas Bordeaux testified that the only stockholders of Mason County Logging Company were himself, his brother and Mrs. A. H. Anderson, of Seattle. (Dep. 36.) Mark E. Reed, of Shelton, was acting as trustee for Mrs. Anderson. (Dep. 36.) He discussed the matter with Reed, who was always opposed to buying the Vance holdings because Vance wanted too much money. (Dep. 36-7.) He first talked with Reed on the subject about the first of the year 1924. (Dep. 37.) He did not remember receiving a plat from Reed, but did remember seeing it in the office. (Dep. 38-9.) It was not necessary to get Reed's consent to buy the property. (Dep. 48.) Thomas Bordeaux is the active manager of Mason County Logging Company. (Dep. 51.)

C. R. BORDEAUX, the manager of Mason County Logging Company, testified:

We never heard of Miss Ruby M. Gaunt in connection with finding the Mason County Logging Company as a buyer of this property, and never met the lady (Tr. 79). While Reed was a director of Mason County Logging Company, he was never called in except when it came to the matter of final negotiation (Tr. 79-80). When the plat came in from Mr. Reed we were already dealing with Mr. Abel and no attention was given to it as it furnished no information that we did not already have. We had the information from the Vance Lumber Company a long time before the receipt of that plat, as to their being willing to sell their properties (Tr. 80).

Miss Gaunt did not earn a commission by submitting a plat to Reed for him to submit to **unknown** associates.

The testimony of J. A. Vance and H. B. Dollar also shows that Miss Gaunt had nothing to do with the sale to Mason County Logging Co. They did not know her in the negotiations at all, and all negotiations were carried on by W. H. Abel. None of this testimony is denied and the only fact on which a claim of commission is based is that a plat was mailed to Reed, of Simpson Logging Company, and that Reed mailed this plat to Mason County Logging Company. However, it is undisputed that Mason County Logging Co. was not interested in the plat.

It already had the information and the plat did not aid nor induce the sale made by Abel the following January.

A broker employed to sell lands is not entitled to a commission unless he procures a purchaser. This Miss Gaunt did not do. Judge Neterer decided that the sale was made through W. H. Abel (Tr. 36, 71).

A principal may make a sale himself, and broker's contract is not violated thereby. Sunnyside v. Bernier, 119 Wash. 386. Nor does an exclusive broker's contract prevent sale by the owner without liability for commission. Hammond v. Mau, 69 Wash. 204; Elsom v. Sanders, 121 Wash. 391; Fawkner v. Rio Negro, 104 Wash. 571.

The sale was consummated through another agent and there was no liability for commission. Taylor v. Maddux, 4 F. (2d) 447. Nor is a broker entitled to a commission when he does not disclose the purchaser's identity. Penter v. Straight, 1 Wash. 365.

MISTAKE

The letter on which the suit is based, described no lands at all. The plat sent with the letter was unsigned. Certain squares of the plat were colored. On the margin of the plat, unsigned, was the following:

> "Also lands in Section 10, 16, 17, in Township 17 North, Range 5 West on which the mill buildings or other buildings are located."

There is here an entire lack of description of any particular lands.

The omission was intentional and there is no testimony showing a mistake, mutual or otherwise. The only testimony on the subject came from Vance (Tr. 69-70) and Dollar (Tr. 59), each of whom were placed on the stand by plaintiff. Miss Gaunt died after suit was brought and her testimony was not available, except that given in the law action in the state court, where no claim of mistake had been made. There is no proof that all these lands later sold were originally intended to be sold at the time that Miss Gaunt was employed as broker.

The parties had never orally discussed or agreed on the identity of the property to be sold. The testimony of Vance (Tr. 69-70), Dollar (Tr. 59) and Abel (Tr. 74-75) shows that months later, in order to make a sale to Mason County Logging Company, it was decided to sell the farm, the lumber yard at Elma, the cleared lands and the logged-off lands. In drafting the complaint, the description contained in the contract of sale, including these lands, was copied, and there was alleged and imputed to Vance Lumber Company a previous intention to sell all of these lands. These allegations were not supported by proof, and the trial court held the minds of the parties had never met upon the subject-matter of the property to be sold.

1 Story, Eq. Jur. (13th ed.), sec. 177, under "Mistake," as applied to the reformation of powers, col-

lects the English cases which shows that a court of equity is powerless to supply terms to an instrument otherwise void; the effect would be to defeat the very policy of the legislative enactment. Story states:

> "And indeed it may be stated as generally although not universally true, that the remedial power of courts of equity does not extend to the supplying of any circumstance for the want of which the Legislature has declared the instrument void; for otherwise equity would in effect defeat the very policy of the legislative enactments." (Citing many English cases.)

Pomeroy, Eq. Jur., Sec. 867 (4th ed.) states:

> "That the courts of some states have refused to apply the doctrine of parol variation on behalf of the plaintiff to written instruments within the statute of frauds, when the modification will enlarge the scope of the instrument so that it should include subject-matter not embraced within it as it stands, or would increase the estate, or would otherwise cause it to operate upon interests which were not originally contained within its terms. The leading case is Glass v. Hulbert, 102 Mass. 24."

COURTS OF EQUITY APPLY LOCAL STATUTES

It is well settled that federal courts of equity, in cases involving questions of local law, follow the state statute. Thus, this court in Old Colony Trust Co. v. Tacoma, 230 Fed. 389, said, speaking by Gilbert, J.:

> "While the third question did not depend up-

on the construction of a state statute, it involved the application of principles of law to local conditions, and the ruling of the state court should be controlling in a federal court."

The supreme court in Hedges v. Dixon County, 150 U. S. 182, said:

"Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by positive provisions of a statute equally with courts of law, and where the transaction or the contract is declared void, because not in compliance with express statutory or constitutional provisions, a court of equity cannot interpose to give validity to such transaction or contract, or any part thereof."

In Magniac v. Thomson, 56 U. S. 282, it was said:

"Wherever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation. but in all such instances the maxim **'Aequitas sequitus legem"** is strictly applicable."

In the following suits in equity in federal courts, the court has applied, and considered itself bound by, the state statute of frauds, and state decisions based on it:

Brashear v. West, 7 Pet. 608;
Lloyd v. Fulton, 91 U. S. 487;
Massey v. Allen, 17 Wall. 354;
Andrews v. Youngstown, 39 Fed. 353;
Beckwith v. Clark, 188 Fed. 171 (8 C. C. A.).

Brashear v. West, 7 Pet. 608, a suit in equity, in which the local statute of frauds was given effect. The case involved the validity of a deed of assignment, a question of substantive right. The court said:

> "The construction which the courts of that state have put on the Pennsylvania statute of frauds must be received in the courts of the United States."

> "In Lippincott and Annesly v. Barker (2 Binney, 174) this question arose, and was decided after elaborate argument in favor of the validity of the deed. This decision was made in 1809, and has, we understand, been considered ever since as settled law."

> "In Pierpont and Lord v. Graham (4 Wash. Rep. 232) the same question was made, and was decided by Judge Washington in favor of the validity of the deed. This decision was made in 1816. We are informed of no contrary decision in the State of Pennsylvania, and must consider it as the settled construction of their statute."

Lloyd v. Fulton, 91 U. S. 487, was a suit in equity, arising in a state where the English statute of frauds touching promises made in consideration of marriage, is in force, and a verbal promise of the husband to settle property on his wife made before the marriage is void. The court gave effect to the statute and held the contract to be void.

Massey v. Allen, 17 Wall. 354, was a petition of an assignee in bankruptcy to set aside a bill of sale of

household furniture. The opinion is by Justice Field, and he applied the statute of frauds of Missouri and said:

> "The statute being a local one applying only to sales in Missouri, this court will follow the construction given to it by the highest court of the state."

Andrews v. Youngstown, supra, was a suit to reform a written instrument and for specific performance. The contract was void under the Pennsylvania statute of frauds. The court, in denying equitable relief, said:

> "Confessedly, then, there is here no contract which legally binds the defendant. But if there is no such valid contract at law, upon what principle can the plaintiff be granted the equitable relief here sought? Undoubtedly the above quoted statutory provision is as binding on a court of equity as on a court of law. Litchfield v. Ballou, 114 U. S. 190. Certainly the general rule is that courts of equity cannot dispense with regulations prescribed by a statute, or supply any circumstance for the want of which the statute has declared the instrument void. 1 Story, Eq. Jur. 96, 177."

Beckwith v. Clark, 188 Fed. 171 (8th C. C. A.) was a suit in equity for specific performance where the court, by Sanborn, J., said, in applying the Kansas statute of frauds:

> "Rules of property established by the construction of the highest judicial tribune of a state of its constitution or statutes prevail in the federal courts where no question of right under

> the constitution or laws of the nation and no question of general or commercial law is involved."

CONTRACT IS VOID

Judge Neterer decided the contract to be void under Rem. Comp. St., section 5825, heretofore quoted, because it did not describe the property to be sold. The letter describes no lands at all. The imperfect description in the plat reads:

> "Also lands in Sections 10, 16, 17 in Township 17 N. R. 5 West on which the mill, mill buildings —and other buildings are located."

Thompson v. English, 76 Wash. 23, is in point. There the contract was held void under the statute of frauds, where the property was described as:

> "Seventy-nine acres in section 30, township 2 N., Range 3 E. W. M., Clarke Co., Wn. Owner, A. E. English."

The court said, as page 26:

> "It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property. This question has recently been before the court in the case of Cushing v. Monarch Timber Co., 75 Wash. 678."

Keith v. Smith, 46 Wash. 131, action for broker's commission. It was said:

> "After placing the most liberal construction upon the note or memorandum pleaded by the appellants, we fail to see how it can be held a sufficient compliance with the statute. It does not purport to authorize or employ the plaintiffs to act as brokers. It describes no particular real estate. * * * The alleged memorandum is so signally indefinite in its terms that it utterly fails to amount to written evidence of an agreement authorizing or employing the appellants to purchase real estate for the respondents for a commission or compensation."

Farley v. Fair, 144 Wash. 101, action for broker's commission. The property was insufficiently described. The court said:

> "Our statute of frauds declares a public policy (Chamber v. Kirkpatrick, 142 Wash. 630), and we may not subordinate that which has been made a public policy of this state to the laws of some other jurisdiction."

In Grafton v. Cummings, 99 U. S. 122, the supreme court applied the statute of frauds of New Hampshire and said:

> "It is therefore an essential element of a contract in writing that it shall contain within itself a description of the thing sold, by which it can be known or identified——"

The supreme court of Washington has cited and applied the Grafton case in Swartswood v. Naslin, 57 Wash. 287 (op. by Rudkin, C. J.) where the memcrandum of agreement for the employment of a broker to sell real estate was insufficient among oth-

er reasons because it did not describe the real estate, and in Cushing v. Monarch Timber Co., 75 Wash. 686, where the court said:

> "The description being essential, it follows that it must be such a description as would meet the requirements of a sufficient description under any phase of the statute of frauds, as, for instance, when invoked in actions for specific performance. It must be a description, complete within itself, by which the realty to be sold can be known and identified."

Other cases in which the description was insufficient and brokers' contracts held void, are:

White v. P. L. & S., 129 Wash. 189, "Shingle mill plant situated in the City of Olympia, Washington;" Salin v. Roy, 81 Wash. 261, "My timber and sawmill near Dupont, Washington;" Engleson v. P. C., 74 Wash. 424, "Shingle timber for sale in Clallam County, Washington;" Baylor v. Tolliver, 81 Wash. 257, "My property, including 121 acres of land near Ephrata, etc."; Rogers v. Lippy, 99 Wash. 312, "My stock ranch located in sections 9, 17 and 21, township 3 South, Range 13 East, Sweetgrass County, Montana;" Nance v. Valentine, 99 Wash. 323, "My property, the 667 acre hay ranch located near Cataldo, Idaho,"—are held to be insufficient descriptions to satisfy the statute.

Nor is a recovery upon **quantum meruit** allowed:

Keith v. Smith, 46 Wash. 131;

Briggs v. Bounds, 48 Wash. 579;

Cushing v. Monarch Timber Co., 75 Wash. 685;

Modern Irr. Land Co. v. Neely, 81 Wash. 39, 46.

JURISDICTION IN EQUITY

Appellant argues that to apply the state statute of frauds is to limit the jurisdiction of the trial court sitting in equity. The argument confuses procedural with substantive rights. The state statute of frauds deals with substantive rights, not with procedure or with remedies; it merely declares a broker's contract for commission to be void unless in writing.

For a federal court sitting in equity to reform a contract, which by the provisions of the state statute is a void contract, is to nullify the state statute. In such case the court in equity would give effect to that which the state law says no effect shall be given.

The appellant misconstrues the application of the statute of frauds. In no way does that statute restrict the jurisdiction of a federal court in equity in considering and deciding a question presented to it. Courts of equity, whether state or federal, follow the law. Indeed, that is one of the settled maxims of equity jurisprudence.

The leading case on the subject is Brine v. Hartford Fire Ins. Co., 96 U. S. 627, which involved the point whether a federal court in equity was bound

by the state redemption statute, or whether the federal equity practice applied. The opinion by Miller, Justice, said:

> "We are of the opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the federal courts, as regards mere modes of procedure, they are of paramount force, and the the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition, that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it moulds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sence unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form."
>
> "Let us see if the Statutes of Illinois on this subject do confer positive and substantial rights in this matter."
>
> "It is not denied that in suits for foreclosure in the courts of that State the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts."

"Nor is it pretended that this court or any other federal court can, in such case, review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantive right which is protected in one set of courts and denied in the other, with no superior to decide which is right."

In Union National Bank v. Bank of Kansas City, 136 U. S. 237, where the trial court had dismisssed the bill in equity because the validity of a deed of trust was to be determined by the state statute and state decisions construing the statute, the court said:

"The determination of these questions is governed by the law of Missouri where the deed was made and the parties to it resided——"

"The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the state establishing a rule of property, are of controlling authority in the courts of the United States——"

"The interpretation within the jurisdiction of one state becomes a part of the law of that state as much so as if incorporated into the body of it by the legislature."

Pomeroy, Eq. Jur. (4th ed.), Sec. 299, reads:

> "While, therefore, it is correctly held that the equitable jurisdiction of the national courts, their power to entertain and decide equitable suits and to grant the remedies properly belonging to a court of equity, is wholly derived from the constitution and laws of the United States, and is utterly unabridged by any state legislation, yet, on the other hand, **the primary rights, interests and estates which are dealt with in such suits and are protected by such remedies are within the scope of state authority, and may be altered, enlarged or restricted by state laws."**

A broker's contract for commissions for the sale of real estate is a rule of property and it has never been held that federal courts in equity will ignore and thus nullify the statute.

INDIVISIBLE CONSIDERATION

The letter on which suit is based stated an indivisible consideration of $3,250,000 for personal property and real property (Tr. 86). It has been decided often by the supreme court of Washington that where an indivisible consideration is stated, if the land is not described, the contract is void in its entirety.

Cushing v. Monarch Timber Co., 75 Wash. 684, considered this precise question. The court said:

> The sale, as we have seen, included timber, timber lands, and a railroad. There was no evidence of any segregation of the price paid for the timber from that paid for the other proper-

ty involved, nor was there any evidence that the parties to this action ever contemplated any such segregation. It is manifest that if there was any contract or agreement to pay a commission upon any sale, it was upon a sale of all of these properties. It is equally manifest that whatever the agreement, it rested, so far as the thing sold was concerned, wholly in parol. It is elementary that a contract part oral and part in writing is obnoxious to the statute."

In White v. Panama Lumber Co., 129 Wash. 189, on page 192, the court said:

"(2) He asserts that because most of the property he sold was personal property, he should, at least, be permitted to recover as to it. The contract, however, was indivisible, and since it is void as to the real estate it is void also as to the personal property. In Dutiel v. Mullens, 192 Ky. 616, 234 S. W. 192, a similar case, the court said:

"'It is contended that the promise to pay the $1,000 evidenced by the check, being in part a promise to pay for land, it was not without consideration—in part at least—as the sale of personal property was not affected by the statute of frauds. The contract as alleged was an entire contract; that is, the land and personal property were sold by one and the same contract. The contract was entire and indivisible. There was no sum fixed as the price of the personalty, separately from the price of the land, so that the sale of one could be held valid and the other invalid. The contract for the sale of the land being indivisible, the contract for the sale of the personalty must also fail, as the two cannot be separated.'"

REFORMATION

Appellant's case depends upon her asserted right to reform by parol evidence a contract which is void under the state statute of frauds. This the state rule forbids.

Construing subdivision 2 of Section 5825 Rem. Comp. St. (the same statute of frauds), Mead v. White, 53 Wash. 638, denied reformation on parol testimony; to do so would void the statute of frauds and permit the contract to rest partly in writing, partly in parol. The court said:

> "Finally, it is contended that a court of equity has power to reform the contract and to enforce it when so reformed. The contract being invalid under the statute, parol evidence will not be admitted for the purpose of reforming it. To do so would result in permitting the parties to accomplish indirectly that which the statute forbids * * * The record does not present the question of reforming a contract so as to speak the truth, but rather of creating a contract in its entirety."

The statute was again applied in McCrea v. Ogden 54 Wash. 521, which involved the right of a broker to recover compensation under a broker's void contract. The court said:

> "But the purpose of the law was to remove all doubt, and in doing so no injustice was done the broker, for it is always within his power to make the contract or memorandum certain in every particular, including the party to be bound, which, notwithstanding the expression in the

former opinion to the contrary, we regard as the first essential of the law; which element, if proven in this case, would necessitate a resort to parol testimony. In Forland v. Boyum, 53 Wash. 421, following Foot v. Robbins, 50 Wash. 277, and Keith v. Smith, 46 Wash. 131, in construing this same statute, we held that the terms of the contract must appear from the writing itself, and that parol testimony could not be received to ascertain the amount agreed on as a commission. In Mead v. White, 53 Wash. 638, the court said, in construing a contract involving the principles here presented:

"'In order to hold the respondents to any liability, the court would be required to create a contract, either by construction or by parol evdence. There is no language in the contract to warrant the former, and the latter is within the prohibition of the statute.'"

It is conceded that equity will reform instruments for mutual mistake. But that does not mean that a court of equity will not follow the state statute of frauds. None of the cases relied on by the other side in support of their position involves the statute of frauds. It has never been the rule that a court of equity, under the guise of reforming the contract for mistake will add essential terms to the contract. That would be to construct a contract for the parties.

2 Story, Eq. Jur. (13th ed.), Section 770-a, Page 93, states:

"In the case of a plaintiff seeking the specific performance of a contract, if it is reduced to

writing, courts of equity will not ordinarily entertain a bill to decree a specific performance thereof with variations or additions or new terms to be made and introduced into it by parol evidence; for in such a case the effect is to enforce a contract partly in writing and partly by parol; and courts of equity deem the writing to be higher proof of the real intentions of the parties than any parol proof can generally be, independently of the objection which arises in many cases under the statute of frauds."

PAROL EVIDENCE INADMISSIBLE

It is the settled rule in the State of Washington that a broker's contract, that under the statute of frauds must be in writing which omits essential terms, such as the description of the property, may not be aided by parol testimony to establish any material element of the contract. The latest decision upon the subject of the supreme court of the State of Washington is Black v. Milliken, 143 Wash. 204. The court denied recovery and said:

> "The memorandum is not complete in itself, and resort must be made to other writings or oral testimony in order to determine the amount to be paid. This we have held in numerous actions of like character cannot be done—— The subject-matter of the sale upon which the commission is claimed is an essential part of the contract, and the writing evidencing the agreement must be such as to make it unnecessary to resort to parol evidence to establish any essential part of the agreement."

Without laboring the point, the supreme court of Washington has for many years consistently held that essential terms may not be supplied by parol testimony. A leading case upon the subject is Cushing v. Monarch Timber Company, 75 Wash. 678. Many other cases are cited in our list of authorities. The reasons for the rule are well stated in Allen v. Kitchen, an Idaho case reported in 100 Pac. 1052.

That is a leading case under the Idaho statute of frauds, requiring contracts for the sale of lands to be in writing, and holding that omitted essential terms may not be supplied by parol. It was said:

> "The question arises as to whether or not a contract of this kind within the statute of frauds (Section 6007 of the Revised Codes) can be so reformed by a court of equity as to make a good and complete description out of an insufficient and void description. It is not a question here of making a contract speak the truth which by its terms speaks untruthfully, or, in other words, of making a contract express the true intent of the contracting parties where in fact it expresses on its face something they did not intend or agree upon. There is no contention made here that the contract in any way speaks untruthfully. The complaint is that it does not speak the whole truth. This is the very thing the statute of frauds is enacted to guard against. It requires the contract to be in writing, and prohibits oral evidence to establish a contract of this kind. There is no contract until it is reduced to writing as provided by law. It is not a question as to what the contract was intended to be, but, rather, was it consummated

> by being reduced to writing as prescribed by the statute of frauds. Admittedly an essential portion of the contract in this case was not reduced to writing and subscribed by the party to be bound. This case, therefore, presents the question of adding to and supplying an insufficient description, rather than that of reforming an untruthful description. If a court of equity can supply one requirement of a contract that is required by the statute of frauds to be in writing, it may supply another, and the logical conclusion would be that it might in the end supply all the requirements, and thereby contravene a positive statute. This cannot be done."

Another important case is Safe Deposit v. Diamond Coal Co., L. R. A. 1917 A 596 (Pa.). The supreme court of Pennsylvania reviews the American and English cases and holds that equity will not by the use of parol evidence reform, and cannot enforce as reformed, a contract made void by the statute of frauds.

> "Where, however, the people speaking through the legislative branch of the government have declared that contracts relative to certain subjects shall possess certain requisites necessary to their validity, it is not within the power or the jurisdiction of a court of equity to annul or disregard the mandate. Equity corrects that wherein the law is deficient, but where the statutory law has spoken, equity must remain silent. * * * We are clear that upon reason and authority a court of equity cannot vary or rectify by parol an executory agreement in writing for the sale of lands, and as thus varied, in the absence of an estoppel, specifically enforce

performance of it. It is the doctrine of this court, declared in numerous cases, that, where a written agreement is varied by oral testimony, the whole contract in legal contemplation becomes parol. If there is anything settled in our law, that principle is firmly established. When, therefore, a party to an executory agreement in writing for the sale of lands succeeds in reforming it by oral testimony, he has reduced the whole agreement to a parol contract, and deprives himself of the right to have it specifically performed. He pulls down the house on his own head. When he converts the writing into an oral agreement, the statute declares it to 'be void.' He has rectified the written agreement, and in its place has established an agreement which in contemplation of law is parol, and therefore, by statutory mandate, absolutely invalid and without force. The true contract, as declared by the chancellor, cannot be enforced. 'It is then apparent,' says Judge Hare, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 494, 'that the contract as it stands is not the true one, and that the true contract is invalidated by the statute, and as the former ought not to be, and the latter cannot be, enforced, there is no room for a decree of specific performance.' "

PART PERFORMANCE

Obviously, there can be no recovery on a broker's contract for commission unless the broker performs his contract. However, because Vance Lumber Company wrote to Miss Gaunt on August 15, 1923 (Ex. 5, Tr. 117)—"As we are giving an option on the property that we offered for sale, please do not do anything further with this until you hear from us

again," we now discuss whether Miss Gaunt, up to that time, had procured a purchaser. All she had done was to mail a copy of the plat to Mark E. Reed, of Simpson Logging Company. He was a trustee of Mason County Logging Company and sent the plat to its president, Thomas Bordeaux. Bordeaux was already dealing for Mason County Logging Company to buy the property through W. H. Abel. The testimony is express on this point.

C. R. Bordeaux, secretary and manager of Mason County Logging Company, testified (Tr. 79):

> "The matter was first submitted to me, about buying these properties, something like a year and a half before we closed the deal. We never heard of Miss Ruby M. Gaunt in connection with finding the Mason County Logging Company as a buyer of this property, and never met the lady. * * * We were already dealing with Mr. Abel when the plat came in from Mr. Reed, and no attention was given to it as it furnished no information that we did not already have."

H. B. Dollar, secretary of Vance Lumber Company, testified (Tr. 60):

> "Vance Lumber Company had been negotiating with Mason County Logging Company, with reference to the purchase, for about a year and a half. Mr. Abel had had this up with the Vance Lumber Company about a year and a half before the option was given. Mr. Abel had been seen many times in connection with the giving of this option, during the year and a half. Miss Gaunt had nothing to do whatever with the se-

curing of the option which was given in August to Mason County Logging Company."

W. D. ABEL testified (Tr. 80):

> "Some time in June, 1923, I went with my father (W. H. Abel) to the town of Bordeaux. He talked over at that time with Thomas Bordeaux concerning the sale of the Vance properties, in connection with which he had been working with them for some time. He showed to Mr. Bordeaux maps and plats, and they went over the topography showing the location of the Vance properties."

W. H. Abel testified (Tr. 71):

> "I was connected with the sale of the lands of Vance Lumber Company to Mason County Logging Company from February, 1922, up to the time the sale was finally closed, as attorney for each party. I began negotiations for the sale of these properties to Mason County Logging Company on February 7, 1922. On that date, I wrote a letter to Mr. Bordeaux about giving an option."

The trial court properly found that Miss Gaunt did not procure Mason County Logging Company as a purchaser.

The Washington rule is that a broker's contract void under the statute of frauds, is not saved by performance, partial or complete.

In Keith v. Smith, 46 Wash. 131, it was said:

> "The courts of the several states in which statutes of this character have been enacted

have constantly adhered to the rule that no action can be maintained for services performed in purchasing or selling real estate by an agent or broker, unless his contract of employment is in writing. This rule enforces the legislative intent evidenced by the enactment of such statutes. No other construction would do so. From its very nature a claim for commission could not be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself."

In Cushing v. Monarch Timber Co., 75 Wash. 678, at page 687, the court said:

"Nor does the fact that the sale was actually made, even if it be conceded that it was made entirely through the efforts of the respondents, furnish any ground for recovery. Performance does not take the contract out of the statute of frauds.

" 'From its very nature a claim for commission could not be made until earned, and to hold that performance would take an action of this character out of the operation of the statute would nullify the statute itself.' Keith v. Smith, supra.

"For the same reason there can be no recovery upon the quantum meruit or upon an implied contract to pay for services rendered. Historically considered, all statutes of fraud are intended 'for the prevention of frauds and perjuries.' Craig v. Zelian, supra. To permit a recovery upon the quantum meruit or upon an implied contract would be to defeat the purpose of the statute and supply by implication a contract

> which the statute expressly says may only be proven by written evidence."

UNRELATED WRITINGS

The unsigned plat was not attached to the letter on which suit is based. Neither of them made reference to the other and only by parol evidence are they connected.

27 C. J. 262 states the doctrine of related writings as it concerns the statute of frauds:

> "It is a general rule that the reference, relation or connection of the writings to or with each other, must appear on their face. The writings must contain either an express reference to each other or internal evidence of their unity, relation or connection."

12 Enc. Ev. 18 states:

> "The connection between the papers relied on must be made from the internal evidence they supply; * * * In order to show compliance with the statute by means of letters and other writings, these must all be signed by the party authorized to convey."

This rule has been applied by the supreme court of Washington in Broadway v. Decker, 47 Wash. 586, where the court quoted from 17 Cyc. 748e:

> "The rule that where a contract upon its face is incomplete resort may be had to parol evidence to supply the omitted stipulation applies only in cases unaffected by the statute of frauds. If the subject-matter of the contract is within

the statute of frauds and the contract or memorandum is deficient in some one or more of these essentials required by the statute, parol evidence cannot be received to supply the defects, for this would be to do the very thing prohibited by the statute."

In Gilman v. Brunton, 94 Wash. 5, the court said:

> The reference is not to an instrument containing a sufficient description, but merely declares the propery is 'the same property conveyed to the party of the first part (Brunton) by W. Tate and wife in 1912.' Parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance. In Thompson v. English, 76 Wash. 23, in a case involving a somewhat similar description, this court said:
>
> " 'The description of the property as contained in the contract was, "Seventy-nine acres in Section 30, township 2 N., Range 3 E. W. M., Clarke Co., Wash. Owner, A. E. English." It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property.' "

In Nance v. Valentine, 99 Wash. 325, where the court said:

> "It is contended by counsel for appellant that, under the pleadings and the evidence, this contract and the one between respondent and Blue for the exchange of lands should be read together to the end that the description in this contract be aided by the description in the exchange contract. This contract makes no refer-

> ence whatever to the exchange contract or to any other contract. That would be aiding the description by resorting to something to which this contract makes no reference whatever."

Thus parol evidence is not admissible to connect the unsigned plat with the signed letter, but if considered together, they do not comply with the statute of frauds. It was so hold in the state court, in the former litigation between the parties, upon similar evidence. The description is wholly insufficient.

SUMMARY

While mistake and fraud are alleged, not a witness testified in support of the charge. The case presented is one where the property was not described; the omission was intentional, and each side knew it to be such.

Gaunt did not procure Mason County Logging Company as a purchaser. It was already interested, had plats and information from another agent, when she mailed the plat to Mark E. Reed, of Simpson Logging Company. This other agent made the sale and collected the commission. Gaunt did not know Mason County Logging Company at all. She had never met Mark E. Reed, nor any officer of Mason County Logging Company.

Equity follows the law. This court will apply the local rule of property. Whenever the question has been presented in a federal court of equity, it has been decided that the court will follow the state stat-

ute of frauds. According to the Washington Statute and decisions there can be no recovery upon the contract sued on; nor can it be reformed by parol testimony- nor is it aided by part performance; nor can there be a recovery on **quantum meruit.**

While Miss Gaunt was putting the deal up to Anderson & Middleton Lumber Company, Vance Lumber Company was, through its agent and attorney, actively negotiating to sell the properties to Mason County Logging Company.

Miss Gaunt did not procure a purchaser; she was not the efficient cause of the sale. Indeed, she did participate therein. At most, she mailed a plat to a trustee of a concern already interested. At a later date, Mason County Logging Company obtained an option through no aid of hers. That option was allowed to expire, but thereafter negotiations were resumed and a sale made. Gaunt's case has no equity to support it.

The property was situate in the State of Washington. The parties to the contract lived there. She sued in the state court for $50,000 commission and was denied recovery. Later she took up her residence in Oregon and thereafter brought suit in equity to reform a void contract. During the period of three and one-half years, no suggestion was made that the contract, by mutual mistake, omitted description of the property. Not a witness testified that the omission was by mistake, mutual or otherwise.

The case is one where the agent claims a commission for making a sale to a buyer whom she never met, with whom she never had any correspondence, merely because she sent to a trustee of the buyer a map without description of the property to be submitted to another company, to-wit: Simpson Logging Company.

The decision and decree of Judge Neterer is supported by undisputed proofs and should be affirmed.

Respectfully submitted,

W. H. ABEL, and

POE, FALKNOR, FALKNOR & EMORY,

Attorneys for Appellee.

No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased, *Appellant,*

—VS.—

VANCE LUMBER COMPANY, a corporation, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

REPLY BRIEF OF APPELLANT

B. S. GROSSCUP,
W. C. MORROW,
CHAS. A. WALLACE,
Counsel for Appellant.

Seattle, Washington.

THE ARGUS, SEATTLE

FILED
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No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased, *Appellant*,

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CHAS. A. WALLACE,
Counsel for Appellant.

Seattle, Washington.

THE ARGUS, SEATTLE

United States
Circuit Court of Appeals
For The Ninth Circuit

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Appellant,

—vs.—

VANCE LUMBER COMPANY, a corporation,
Appellee.

No. 5636

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

REPLY BRIEF OF APPELLANT

This action was brought:

1. To reform a writing signed by one of the parties and accepted by the other by incorporating therein a more complete description of the land intended to be the subject of the contract.

2. To enforce the contract actually entered into by the parties and performed by the appellant.

The District Court denied reformation. The complainant, having been defeated on that preliminary issue, went out of court and has come into this court

on that issue and that issue alone. Matters in support of and defense of enforcement of the contract, when reformed, are not before this court at this time. The sole issue is the right of reformation.

Appellee's brief concedes the fact that it was the intention of the Company to sell and to employ the Broker to sell all the timber land indicated on the plat, Exhibit 2, and all the property, real and personal, constituting the operating plant located on Sections 10, 16 and 17, Township 17 N., Range 5 W. It is said by appellee, page 19, "The omission was intentional and there is no testimony showing a mistake, mutual or otherwise." This statement can mean nothing less than a confession of fraud. Under the guidance of an able lawyer, intimately connected with its affairs, both as legal and business adviser, the Company was taking advantage of the Broker's ignorance of the law to secure her services for nothing. Such unconscionable conduct estops the Company to plead the statute of frauds as a defense. This proposition is supported by all the cases.

> "It is the well settled doctrine that if one of the parties to a contract which is required by the statute of frauds to be in writing, by his own fraudulent practices prevents it from being reduced to writing in compliance with the statute, equity will interfere at the suit of the other party, and will enforce the agreement, although verbal."
>
> 2 Pomeroy's Eq. Jur. (4th Ed.), note to §867, p. 1781.

The cases cited sustain the text.

The cases cited by appellee involving actions at law and actions in equity for specific performance without reformation have no application to a case for reformation.

Cases where the subject matter of the contract actually agreed upon is in substance illegal and void have no application.

Cases where the parties have not actually entered into the contract have no application. These propositions are illustrated by some of the cases cited.

Hedges v. Dixon, 150 U. S. 182.

In this case it is held that where the substance of the contract entered into between the parties is prohibited by statute, the contract is not enforcible in equity, the court saying, on page 192:

> "Where a contract is void at law *for want of power to make it*, a court of equity has no jurisdiction to enforce such contract, or, *in the absence of fraud, accident, or mistake* to so modify it as to make it legal and then enforce it."

Magniac v. Thomson, 15 How. 281.

In this case it is said, at page 302:

> "Equity may be invoked to aid in the completion of a just but imperfect legal title, or to prevent the successful assertion of an unconscientious and incomplete legal advantage; but to abrogate or to assail a perfect and independent legal right, it can have no pretension. In all such instances, equity must follow, or in other words, be subordinate to the law."

It is further said that there is no evidence tending

to impeach the written agreement as a true statement of the facts and intention of the parties.

1 Story's Eq. Jur. §177 is referred to. In this paragraph Mr. Story says:

> "Equity may compel parties to execute their agreements, but it has no authority to make agreements for them or to substitute one for another. If there had been any mistake in the instrument itself, so that it did not contain what the parties had agreed on, that would have formed a very different case; for where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake of the draftsman either as to fact or to law does not fulfill that intention, or violates it, equity will correct the mistake so as to produce a conformity to the instrument."

Brashear v. West, 7 Pet. 607.

In this case it is said, p. 616:

> "To deprive a party of the fruits of a judgment at law, it must be against conscience that he should enjoy them; the party complaining must show that he has more equity than the party in whose favor the law has decided."

There are two diverging lines of decision, in cases involving reformation and specific performance of the contract as reformed, where it is sought by correction of the writing to add to its terms. Professor Pomeroy, in his able chapter on "Mistake", reviews both lines of authority with very extensive notes.

Pomeroy's Eq. Jur. (4th Ed.) §§866-872 (pp. 1772-1798).

The leading case sustaining reformation is *Keisselbrack v. Livingston*, 4 Johns Ch. 144, 148. On the opposite side is *Glass v. Hulbert*, 102 Mass. 24.

Then there is a third line of cases which hold that it is permissible under the statute of frauds in an equity suit for reformation to make definite and certain the subject matter of the contract which, on the face of the writing, is incomplete.

Our attention has not been called to any American case which denies the power of an equity court to make certain that which can be made certain, and when the writing has thus been made certain by a decree of the court, its enforcement is in no sense in conflict with the statute of frauds. The court has not made a contract. It has simply determined what the parties agreed upon, and then put that agreement in legal form as the parties are presumed to have intended.

Where fraud is present, the court will order:

> "The affirmative relief of reformation by which a written instrument is corrected, and perhaps re-executed, when through fraud of the other party, it failed to express the real relations which existed between the two parties."
>
> Pomeroy's Eq. Jur. (4th Ed.) §872, quoted on page 1801.

The power of a court of equity to prevent miscarriage of justice is inherent and superior to any state legislative enactment.

The court is invited to carefully read the extended note to §867 of Pomeroy's Eq. Jur. (4th Ed.), beginning on page 1774 and ending on page 1784,

wherein the learned author comes to the conclusion, both on reason and authority, that the chancery court will not permit the forms of law to be the instrument by means of which one party can cheat another. This power of the equity court transcends all legislation, no matter in what form it may be put. Equity courts from the beginning have been clothed with the power to enforce right and prevent wrong.

Appellee cites no case from the Washington Supreme Court holding that a contract which states the substance of the agreement entered into between the parties cannot be performed so as to require that statement to be made in legal language. The furthest the court has gone is in *Mead v. White*, 53 Wash. 638, where there was an entire lack of an essential element to make a contract. The court held that such essential element did not appear upon the face of the instrument, and that the evidence was conflicting as to the relation of the parties to the instrument. The court held that an important element of the contract could not be shown by parol. In the opinion the court quotes with approval *Allen v. Kitchen*, 100 Pac. 1052, 1057, in which it is said:

> "We are clearly of the opinion that courts of equity have power and jurisdiction to so reform an executory contract that is valid and binding on its face as to relieve it of any statement, declaration, or description that has been inserted therein through deception, fraud, or mutual mistake, *and to make the statements speak the truth as it was intended to insert them in the instrument.*"

In *Cushing v. Monarch Timber Company*, 75 Wash. 678, there was no attempt to reform a contract. The description of the land was simply "my timber." The defense interposed was a demurrer. The court held as a matter of law that the writing on its face was defective. No question of reformation was involved.

None of the other cases cited by appellee involved the question of reformation. All of them were either actions at law or for specific performance.

In closing we call the attention of the court to §910, 2 Pomeroy's Eq. Jur. (4th Ed.). The underlying principle of reformation of an executory contract is: the decree of the court operates personally upon the defendant; it requires the defendant to do what he ought, in good conscience, to do voluntarily, that is, to correct his mistake. In case of fraud he is estopped to claim any of the benefits of his conduct and is required to restore the defrauded party to everything lost by reason of false representations. It is not correct to say that the decree makes valid that which is void.

The decree is the judicial exercise of power by injecting into the contract that which the parties themselves intended should be in the writing. The court in the exercise of its power steps into the breach and requires the doing of that which the parties intended to have done. A party refusing to perform his moral duty is denied any benefits from his wrongful act.

Respectfully submitted,

B. S. Grosscup,
W. C. Morrow,
Chas. A. Wallace,
Counsel for Appellant.

/ 3

No. 5636

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,

Appellee.

Appellee's Additional Memorandum of Cases

Appeal from the United States District Court for the Western District of Washington, Northern Division.

HON. JEREMIAH NETERER, *Judge*

W. H. ABEL, and
POE, FALKNOR, FALKNOR & EMORY,
Attorneys for Appellee.

Postoffice Address:
W. H. ABEL, Montesano, Wash.
POE, FALKNOR, FALKNOR & EMORY,
977 Dexter Horton Bldg.,
Seattle, Washington.

FILED

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,

Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,

Appellee.

Appellee submits the following additional authorities:

Pulcell v. Coleman, 4 Wall. 519, where it was held that the statute of frauds was equally binding on courts of equity as courts of law.

May v. Rice, 101 U. S. 239, which held the statute of frauds to be a complete bar to a bill in equity.

Randall v. Howard, 2 Black 590, a suit in equity in which the Supreme Court of the United States applied the statute of frauds of Maryland. The contract there, as in the instant case, was incomplete.

Dunphy v. Ryan, 116 U. S. 491, where it was held that the mere refusal of a party to perform a parol contract, required by the statute of frauds to be in writing, was not such a fraud as will give a court of equity jurisdiction to enforce it.

Buhl v. Stevens, 84 Fed. 922, at 926, holding that the statute of frauds is as binding upon a court of equity as upon a court of law.

Respectfully submitted,

W. H. ABEL,

Of Attorneys for Appellee.

Signed copy

No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,
Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING
and Brief in Support of Petition

CHAS. A. WALLACE,
B. S. GROSSCUP,
W. C. MORROW,
Counsel for Appellant.

Seattle, Washington.

THE ARGUS, SEATTLE

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No. 5636

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CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,
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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING

CHAS. A. WALLACE,
B. S. GROSSCUP,
W. C. MORROW,
Counsel for Appellant.

Seattle, Washington.

United States Circuit Court of Appeals
For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased, *Appellant*, —vs.— VANCE LUMBER COMPANY, a corporation, *Appellee*.	No. 5636

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

PETITION FOR REHEARING

Appellant respectfully requests this Honorable Court to grant a rehearing in the above entitled cause for the reason that the evidence, most all of which is documentary, conclusively shows the following facts, fully establishing appellant's contentions, all of which this Court found were not proven.

1.

It was the intention of the appellee to sell, and that appellant should find a customer for all its property, including timber lands, cut over lands, mills, cottages and other structures.

2.

The documents as written did not fully describe all

of the property to be sold and did not conform to the intention and agreement of the parties, and for that reason the contract as written is within the statute of frauds and not enforcible at law.

3.

The contract as written by the appellee was so written through inadvertence and mistake on its part, or with the intention to write it in such manner, and in such form, and with such defective description, to bring it within the statute of frauds of the State of Washington and make it unenforcible at law, and thereby commit a fraud upon the appellant.

4.

Plaintiff's exhibit 4 (Transcript 114) does not form any part of the contract in question, was never introduced in evidence, and was included in the transcript of record by accident and error and should be excluded under Equity Rule 76.

5.

The written documents constituted a sufficient memorandum in writing to justify the Court in concluding that all the timber lands, cut over lands, mills, cottages and other structures were intended to be sold and were sufficiently clear to unmistakably indicate to the Court the property that was intended to be sold so as to justify the Court in reforming the instruments by including therein a description of the property referred to in the writings.

6.

The contract was fully performed by appellant and, for this reason, the Court should have reformed the contract to enable her to recover from appellee com-

pensation for services performed and accepted by appellee.

Counsel for appellant was misled by the trial Court in that when the trial Court refused to grant appellant a jury trial in conjunction with the action to reform, and announced that it would hear evidence relating only to the question of reformation, it was not considered that in the hearing on reformation alone appellant should go fully into the facts establishing full and complete performance of her contract and showing that she was the procuring cause of the sale of said property to the Mason County Logging Company.

We respectfully submit that a rehearing should be granted and the contract performed and the cause remanded to the lower Court for trial upon the merits.

Chas. A. Wallace
B. S. Grosscup
W. C. Morrow

Respectfully submitted,

B. S. Grosscup,
W. C. Morrow,
Chas. A. Wallace,
Counsel for Appellant.

Chas. A. Wallace, one of counsel for appellant, hereby certifies that in his judgment the petition for rehearing in the above entitled cause is well founded and that it is not interposed for delay.

Chas. A. Wallace.
Chas. A. Wallace

No. 5636

United States Circuit Court of Appeals

For The Ninth Circuit

CARRIE GAUNT, as Executrix of the Estate of RUBY M. GAUNT, Deceased,
Appellant,

vs.

VANCE LUMBER COMPANY, a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF

In Support of Petition for Rehearing

CHAS. A. WALLACE,
B. S. GROSSCUP,
W. C. MORROW,
Counsel for Appellant.

Seattle, Washington.

THE ARGUS, SEATTLE

United States Circuit Court of Appeals
For The Ninth Circuit

CARRIE GAUNT, as executrix of the estate of RUBY M. GAUNT, deceased,
Appellant,
—vs.—
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No. 5636

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. JEREMIAH NETERER, *Judge*

BRIEF

In Support of Petition for Rehearing

ARGUMENT

The Court, in its decision, says: "The mills and cottages and other structures were doubtless intended by both parties to be within the terms of the contract. * * * *" The letter of July 5th, 1923 (plaintiff's exhibit 1, Tr. 85), says: "We are enclosing herewith plat showing our holdings, together with holdings of other companies in the vicinity." While this does not refer to the cut over lands, the letter of August 15, 1923 (plaintiff's exhibit 5, Tr. 117), re-

fers to the option of August 28, 1923 (plaintiff's exhibit No. 6), which Mr. Dollar says was an option to sell all of the holdings of the Vance Lumber Company and its logging operations around Malone, and that this was the option which he referred to in his letter to Miss Gaunt (plaintiff's exhibit 5). This testimony is found on page 57 Transcript.

In the option (plaintiff's exhibit 6, Tr. 118), we find this language: "There is herewith sent you a list of our 'timber lands.' There is also sent you a list of all of our lands covered by the option which includes the timber lands and the logged off lands." Coupling this option with appellee's letter (plaintiff's exhibit 5), all of which are signed by the appellee, it conclusively shows that it was the intention of the appellee to sell the cut over lands. This declaration of the defendant is in harmony with the testimony of Isaac A. Wilson (Tr. 63): "At that time Mr. Dollar explained that they wanted to sell all their holdings, logged-off lands, mill, townsite, timber, etc." While Mr. Dollar testifies that it was not the intention of the appellee to sell its cut over lands, he does not deny Mr. Wilson's testimony to the effect that they wanted to sell the logged-off lands. The reference by appellee (in exhibit 5) to the option (exhibit 6) constitutes a sufficient written memorandum signed by the party to be charged, to justify the Court in concluding that the cut-over lands were intended to be sold, and the Court should have found from this evidence that the cut-over lands were intended to be sold, and that these signed documents were sufficient to warrant the Court in reforming the contract, notwithstanding the oral

testimony of Mr. Vance, Mr. Dollar, and Mr. Abel, to the effect that it was not the intention of the appellee to sell the cut-over lands. Appellee's witnesses testified that the cut-over lands were included for the purpose of making the sale, but the written evidence conclusively shows that the cut-over lands were included in the option (plaintiff's exhibit 6), which was the first and only option ever entered into between appellee and the buyer.

It is significant that the option fixed the price of the entire holdings of $3,250,000.00 and the evidence shows that the price actually paid was $2,500,000.00. If, as appellee says, 1,000 to 2,000 acres of valuable cut-over lands were not included in appellant's deal and was included in the sale, that the price quoted should be the same in each instance.

The foregoing fully covers the grounds set forth in 1 and 2 of the petition for rehearing.

The failure of the appellee to describe the property intended to be sold was apparently a mistake insofar as it applied to the lands upon which the mills, cottages and other structures were situated, for it appears from all the testimony, and the Court so finds, that it was the intention of both parties to sell the lands upon which these structures were located. Mr. Dollar testified (Tr. 59) that the logged off lands was the only property which was intended to be excluded from the sale. Under this testimony a reasonable person would conclude that the description of the lands upon which these structures stood was omitted by mistake. If it was not by mistake, then the only conclusion left which any reasonable mind could ar-

rive at is that it was, by fraud of the appellee, omitted from the documents. Appellee contends, and the Court finds, that the omission of the description of the cut-over lands was intentional. In view of the signed memorandums (plaintiff's exhibits 1, 5 and 6) the intentional omission of these lands from the written documents constituting the memorandum of agreement was a deliberate fraud of the appellee upon the appellant.

Mr. Dollar testified with reference to plaintiff's exhibit 2 (which was only an exhibit for identification), as follows:

> "Q. Now, Mr. Dollar, was this made by you?
>
> A. No.
>
> Q. Was this (plaintiff's exhibit No. 4) enclosed with your letter of July 5, 1923?
>
> A. No, sir; no it was never made in our office."

This testimony was not included in appellant's statement of the evidence for the reason that neither the document nor the testimony was pertinent to any of the issues to be determined by this Court, and exhibit 4 had no place in the record, and was included therein by mistake of counsel for appellant in the praecipe for transcript of the record as shown on pages 135 and 136 of the record, item No. 11, calling for plaintiff's exhibits numbering from 1 to 16, both inclusive, and should not have contained exhibit for identification No. 4 without Mr. Dollar's explanation thereof. If Mr. Dollar's testimony with respect to this exhibit is questioned by counsel for appellee, then we respectfully request this Honorable Court

to call for a supplemental transcript covering all testimony relating to this exhibit.

This Court, in considering plaintiff's exhibit 4 (Tr. 114), says: "Neither upon the plat nor in this writing was there any description of the cut-over lands, and there is no contention that the company owned all or even the major portion of Sections 10, 16 and 17 in Township 17." Plaintiff's exhibit 3 is the contract between the Mason County Logging Company and the appellee under which the lands were sold, and the description of the lands in 10, 16 and 17 shows that the appellee owned three-quarters of Section 10 (except 4 small garden tracts, the largest of which contained 5.2 acres) not described by metes and bounds as the Court finds, but by legal subdivision (Tr. 88). In Section 16 the company owned substantially one-half of this section and approximately 100 acres in Section 17, which is substantially one-half of the lands in these three sections.

The Court did not give due consideration to the testimony which conclusively established the fact that the trial Court was in error in finding "The most that can be said, the letter with the plat, is the conclusion of the minds of the parties, and basis on which the minds met if they did meet. There was no mutual mistake. If the minds of the parties did not meet upon the letter and the map, there was no meeting of the minds. From the bill of complaint, the minds of the parties never met as to the identity of the property to be sold." "With this view," says this Court, "we are in accord." This Court further says: "Not only is there an absence of reference in

the writing to the cut-over lands but the evidence leaves no room for doubt that such lands were intentionally excluded from the coverage of the so-called contract and the omission of their description was a result of neither mutual mistake or fraud." This conclusion of the Court cannot be justified if you consider and give proper weight to the letter (plaintiff's exhibit 5) which referred to the option (plaintiff's exhibit 6) both of which were signed by the appellee, and the option specifically referred to the logged off or cut-over lands and specifically referred to all the lands of the appellee, including the *timber lands* and *logged off lands*. Such a reference is sufficient, when signed by the party to be charged, to constitute a memorandum of agreement and to warrant the Court in reforming the contract. When these documents, all of which are signed by the party to be charged, are taken together they are sufficient to warrant the Court in concluding that the cut-over lands were intended to be in the memorandum, and such a reference is sufficient to connect all the documents relating to the transaction.

Beckwith v. Talbot, 95 U. S. 289;
Ryan v. United States, 136 U. S. 68.

This Court further said: "It is to be inferred that both parties in good faith believed it (the memorandum) to be sufficient, and the mistake was a mistake in judgment as to its legal sufficiency." If the Court here has reference to the sufficiency of the memorandum under the statute of frauds to constitute a cause of action at law, we fully agree; but it is appellant's contention that she should not be required to go fur-

ther than to produce and prove by competent evidence, signed memorandums, referring to each other, sufficiently identifying the property to warrant a Court of equity in saying that the property intended to be sold is sufficiently referred to to be identified, and that a description of the property can be ascertained from the signed memorandum. This Court is in error in holding that the memorandum agreement could not be reformed, even though it is correct in concluding that the mistake was one of law, for there was no evidence upon which the Court could justify its conclusion that appellant had not fully and completely performed her part of the agreement. The record shows that, after receiving the letter of July 5th, she commenced to perform her contract and to seek a customer for appellee's property, and on August 9th advised appellee by letter (plaintiff's exhibit 9) that she had submitted the property to Mark E. Reed and his associates for their consideration. This shows, contrary to the finding of this Court, an acknowledgment of her obligation and an effort to perform her part of the contract, and was a complete performance for the reason that six days thereafter appellee requested appellant not to do anything further in the matter until she heard from them again (Plaintiff's exhibit No. 5). The appellant was never thereafter called upon to do anything further and her contract, on her part, was fully and completely performed.

Mr. Bordeaux, in his deposition (which is an exhibit in the above entitled case) on page 36 of the original document, pp. 38 to 41 of the printed supplemental transcript of record, testified that Mark E. Reed was

one of the directors of the Mason County Logging Company; that Reed represented Mrs. Anderson or the Anderson Estate, and that Mrs. Anderson was owner of 50% of the stock of the Mason County Logging Company. Mr. Bordeaux says he talked to Mr. Reed about August 27, 1923, when the option was taken and that it was very likely that the option was taken as a result of this talk with Mr. Reed and that he and his brother who were the other trustees of Mason County Logging Company would not have purchased the Vance property without Mr. Mark E. Reed's consent (Bordeaux's deposition, page 51). Appellee produced Reed and Reed purchased the property for Mason County Logging Company. It could not and would not have been purchased without his consent.

Ample and sufficient additional testimony touching upon the question of whether or not appellant was the procuring cause of the sale to the Mason County Logging Company can be produced and would have been produced at the trial of said cause if the trial Court had not ruled that the only question which he would try was the question of reformation. If the Court had called a jury as requested, or had announced that he would not grant appellant a jury trial, and that he would try, along with the question of reformation, the case on its merits, sufficient competent testimony would have been introduced to established the fact that she was the procuring cause of the sale to the Mason County Logging Company. The record shows that she fully performed her contract, at least up to the time appellee requested her to not do anything further

and as they never thereafter called on her to do anything more her contract was fully performed.

Respectfully submitted,

B. S. Grosscup,
W. C. Morrow,
Chas. A. Wallace,
Counsel for Appellant.

No. 5638

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. GUTHRIE & CO., INC.,

Appellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Appellee,

AND

CHESLEY TUG & BARGE COMPANY, a corporation,

Appellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Appellee.

Apostles on Appeals

Appeals from the United States District Court for the Western District of Washington, Southern Division

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No.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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NAMES AND ADDRESSES OF COUNSEL IN CONSOLIDATED CAUSES ON APPEAL.

WILLIAM H. GORHAM, Esquire, Proctor for Appellants,

659 Colman Building, Seattle, Washington.

Messrs. COSGROVE & TERHUNE, Proctors for Appellees,

2002 L. C. Smith Building, Seattle, Washington.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5538.

A. GUTHRIE & CO., INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

STATEMENT.

CAUSE NO. 5538.

TIME OF COMMENCEMENT OF CAUSE.

July 31, 1926.

NAMES OF PARTIES TO CAUSE.

A. GUTHRIE & CO., INC., Libellant.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation, Respondent.

NAMES AND ADDRESSES OF COUNSEL.

William H. Gorham, 659 Colman Building, Seattle, Washington, for Libellant and Appellant.

Howard Cosgrove and Robert S. Terhune, 2002 L. C. Smith Building, Seattle, Washington, for Respondent.

DATE OF FILING OF PLEADING.

Libel filed July 31, 1926.

Amended libel filed February 4, 1927.

Answer filed September 14, 1927.

Stipulation (1) consolidating cause with cause No. 5539 for purposes of trial; (2) Interrogations and answers to be considered as in both causes; (3) Amending answer; dated September 19, 1927, and filed September 28, 1927.

Process, simple monition; no attachment, no arrest, no bail.

Time of trial, December 27th to 31st, inclusive, 1927.

Name of Judge presiding at trial, was the Honorable Edward E. Cushman, of said District Court.

The trial of said cause on the merits, consolidated by stipulation of parties and by order of said District Court with cause No. 5539 for the purposes of trial, was held in open court.

Date of entry of final decree in said cause was February 29, 1928.

Date when the Notice of Appeal in said cause was served and filed was May 24th and 25th, respectively, 1928.

The amount of supersedeas bond was fixed by order of said District Court on May 25th, 1928.

The supersedeas and bond on appeal of Libellant approved by Respondent and thereafter approved by the Judge of said District Court, was filed May 25, 1928.

Assignment of Errors filed May 25, 1928.

Stipulation and Order of District Court enlarging time for settling, etc., Statement of Facts and within which to file Apostles on Appeals and docket said causes in Appellate Court, filed May 25, 1928.

CAUSE NO. 5539.

TIME OF COMMENCEMENT OF CAUSE.

July 31, 1926.

NAMES OF PARTIES TO CAUSE.

Chesley Tug & Barge Company, a corporation, Libellant.

Standard Marine Insurance Company, Ltd.. a corporation, Respondent.

NAMES AND ADDRESSES OF COUNSEL.

William H. Gorham, 659 Colman Building, Seattle, Washington, for Libellant and Appellant.

Howard Cosgrove and Robert S. Terhune, 2002 L. C. Smith Building, Seattle, Washington, for spondent and Appellant.

DATE OF FILING OF PLEADINGS.

Libel filed July 31, 1926.

Second amended libel filed November 1, 1926.

Exceptions to amended libel filed October 9, 1926.

Stipulation that exceptions to amended libel should stand as exceptions to second amended libel, filed November 1, 1926.

Stipulation as to marine insurance contract pleaded in second amended libel and that no reformation required or necessary, filed November 27, 1926.

Memo. decision overruling exceptions to second amended libel, filed January 21, 1927.

Order overruling exceptions to second amended libel filed February 14, 1927.

Answer to second amended libel filed February 15, 1927.

Answer of Libellant to interrogations propounded by Respondent filed December 14, 1927.

Further answer of Libellant to interrogations propounded by Respondent, filed December 22, 1927.

Process, simple maritime; no attachment, no arrest, no bail.

Time of trial, December 27th to 31st, inclusive, 1927.

Name of Judge presiding at trial was the Honorable Edward E. Cushman of said District Court.

The trial of said cause on the merits, consolidated by stipulation of parties and by order of District Court with cause No. 5538 for the purposes of trial, was held in open court.

Date of entry of final decree in said cause was February 29, 1928.

Date when the Notice of Appeal in said cause was served and filed was May 24th and 25th, respectively, 1928.

The amount of the supersedeas bond was fixed by order of said District Court on May 25th, 1928.

The supersedeas and bond on appeal by Libellant approved by Respondent and thereafter approved by the Judge of said District Court, was filed May 25, 1928.

Assignment of Errors filed May 25, 1928.

Stipulation and Order of District Court enlarging time for settling, etc., Statement of Facts and within which to file Apostles on Appeals and docket said causes in Appellate Court, filed May 25, 1928.

STATEMENT COMMON TO BOTH CAUSES.

All of the testimony and other proofs adduced at the trial of said consolidated causes, including depositions read into the record at the trial.

Memorandum of Decision of the Trial Court filed February 10, 1928.

Order enlarging time for settling, etc., Statement of Facts and within which to file Apostles on

Appeals and docket said causes in Appellate Court, filed July 13, 1928.

Order sending up original exhibits, filed September 26, 1928.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5538.

A. GUTHRIE & CO., INC.,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

AMENDED LIBEL.

To the Honorable E. E. Cushman, Judge of the above entitled Court:

The amended libel of A. Guthrie & Co., Inc., a corporation of the State of Minnesota, against the Standard Marine Insurance Company, Ltd., a corporation of Liverpool, England, in a cause of contract, civil and maritime, alleges as follows:

I.

That the Libellant during all the times herein mentioned was and now is a corporation organized

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and existing under and by virtue of the laws of the State of Minnesota and doing business in the State of Oregon.

II.

That the Respondent at all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of Great Britain, writing marine insurance and licensed and authorized by the State of Washington to do and doing a marine insurance business in said state, and has complied with the statutes of the State of Washington relative to foreign insurance companies doing business within said State of Washington.

III.

That between the 1st and 3rd days of February, 1926, both inclusive, Libellant was the sole owner of certain Used Camp Equipment of the aggregate reasonable value of sixty-one hundred ($6100.00) dollars then and there on board certain railroad freight cars, as follows:

Used Camp Equipment on G. N. car No. 60054 of the reasonable value of one thousand ($1,000.00) dollars;

Used Camp Equipment on G. N. car No. 62487 of the reasonable value of twelve hundred ($1200.00) dollars;

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Used Camp Equipment on G. N. car No. 61114 of the reasonable value of nine hundred ($900.00) dollars;

Used Camp Equipment on G. N. car No. 60152 of the reasonable value of three thousand ($3,000.00) dollars;

all of which said Used Camp Equipment on said cars aforesaid Libellant caused to be delivered to and laden aboard car barge known as car barge Chesley No. 1, then lying at Potlatch, Washington, then and there operated by Chesley Tug & Barge Co., a corporation, as sole owner thereof, in connection with and in tow of the Tug Ketchikan II, operated by Libellant as sole owner thereof, for transportation on said barge in tow of said tug from Potlatch to Seattle, Washington, under and according to a tariff schedule issued by said Chesley Tug & Barge Co. as a carrier by water known as tariff schedule C. T. & B. Co. No. 6, W. D. P. W. (Washington Department of Public Works No. 6), then and there in force under the authority and approval of the Public Service Commission of the State of Washington by virtue of authority vested in said Commission under the laws of the State of Washington.

IV.

That thereafter, on or about February 2, 1926,

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and at the request of Libellant, by certificate of insurance No. 74396, dated February 2, 1926, and issued at Seattle by Respondent in consideration of the agreed premium to be paid Respondent by Libellant, Respondent insured Libellant in the sum of $6100.00 on all of said Used Camp Equipment valued at $6100.00, "laden on said vessel or car barge Chesley No. 1 in tow of said tug Ketchikan II," at and from Potlatch to Seattle, Washington, loss, if any, payable at Seattle to the assured or order upon surrender of said certificate properly endorsed and receipted, subject to the terms and conditions of the regular F. P. A. English form of cargo policy issued by Respondent, in said certificate expressly referred to, wherein and whereby Respondent agreed to indemnify Libellant against the adventures and perils of the sea and all other perils, losses and misfortunes that should come to the hurt, detriment or damage of said Used Camp Equipment or any part thereof, and wherein and whereby it was expressly stipulated that said insurance was understood and agreed to be subject to English law and usage as to liability for and settlement of any and all claims; which certificate of insurance together with said F. P. A. English form of cargo policy constitute the entire contract of said marine insurance, copies of which said certificate of insur-

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ance and of said F. P. A. English form of cargo policy are hereto attached marked Exhibit "A" and "B", respectively, hereby referred to and by such reference expressly made a part hereof.

V.

That on February 2, 1926, said tug Ketchikan II departed from Potlatch, Washington, with said car barge in tow, on her said voyage to Seattle, all of said Used Camp Equipment in said Great Northern cars being laden on said car barge as a part of her cargo and as a part of the cargo of said car barge used in connection with and in tow of said tug Ketchikan II; and thereafter and during the currency of said contract of insurance, to-wit: on February 3, 1926, and while said car barge with all of said Used Camp Equipment laden on board thereof in tow of said tug as aforesaid was on her said voyage, in the waters of Puget Sound, said tug with said barge, laden with said Used Camp Equipment in Great Northern cars as aforesaid, met with tempestuous weather and winds and waves which caused the barge to spill all of said Great Northern cars with all of said Used Camp Equipment into the waters of Puget Sound and the same thereby became a total loss.

VI.

That thereafter and in the month of February, 1926, said Libellant tendered to said Respondent the

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sum of .... ($..................)
dollars lawful money of the United States, at Seattle, Washington, in full payment of the premium due under the terms of said contract of insurance, but said Respondent refused to accept the same.

VII.

That thereafter Libellant promptly presented to Respondent, in writing, due notice and proof of said loss and made demand on Respondent for payment of said insurance, but Respondent has at all times refused and still refuses to pay the amount of said insurance or any part thereof, and there is now due and owing thereon from Respondent to Libellant the said sum of Sixty-one hundred ($6100.00) dollars together with interest thereon from February 3rd, 1926, at the rate of six per cent per annum.

VIII.

That the law and usage of England in force February 2, 1926, and at all times thereafter material to this action, provided, *inter alia;* As set forth in An Act to Codify the Law relation to Marine Insurance, of December 21, 1906, known as 6 Edw. 7 c. 41, the text of which Act is set forth at large in Appendix A, Arnould on Marine Insurance and Average, 10th Ed. London. Stevens & Sons, Ltd., 119 and 120 Chancery Lane, W. C. 2; Sweet & Maxwell, Ltd., 3 Chancery Lane, W. C. 2, Law Publish-

(Amended Libel—Cause No. 5538)

ers, 1921; reference to which is hereby made and by such reference the same is expressly made a part hereof as though particularly pleaded.

IX.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore Libellant prays that a monition in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Respondent herein citing it to appear and answer in the premises, and that a decree may be entered herein in favor of Libellant and against Respondent for the sum of sixty-one hundred ($6100.00) dollars together with interest thereon from February 3, 1926, at the rate of six per cent per annum, and for Libellant's costs and disbursements in this action, and that the Court will grant to Libellant such other and further relief as in justice it may be entitled to receive.

A. GUTHRIE & CO., INC.,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

No. 74296

3612.

Standard Marine Insurance Co., Ltd.

of Liverpool, England

CAPITAL $2,500,000

J. B. F. DAVIS & SON, Managers
San Francisco Calif.

Seattle, February 2nd, 1926.

THIS CERTIFIES that A. Guthrie & Co. ... insured under and subject to the terms of open Policy No. Entry No. 74296 of

Standard Marine Insurance Company (Limited)

in the sum of Six thousand one hundred and no/100 Dollars

on $6100. being 1000. on used camp equipment on G.S. Car 306 064 fal
1200 " " " " " " " 62457 fal
900 " " " " " " " 61114 "
3000 " " " " " " " 60152 "

Valued at Six thousand one hundred and no/100 - (as above) - Dollars

Laden (under deck) in the Ship or Vessel called the Chesley Car Barge No.1 in tow

At and from Potlatch to Seattle Ketchikan 2/1

Loss, if any, payable in Seattle to assured

or order, upon surrender of this Certificate properly endorsed and receipted.

Subject to the terms and conditions of the regular F. P. A. English form of Cargo Policy issued by this Company.

(Signed) J. B. F. Davis & Son.

In case of loss hereunder, present this certificate for adjustment to

Agent of this Company at

Warranted free from Particular Average unless directly caused by the vessel being stranded, sunk, burnt or in collision with another ship or vessel.

Warranted free from claim for salvage by towing vessel.

In case of loss or damage ... [illegible]

All Policies issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp affixed within ten days after date of receipt in the United Kingdom

NO.

COPY

AMOUNT

Warranted free of loss or damage caused by strikers, locked-out workmen or persons taking part in labor disturbances or riots or civil commotions.

Warranted free of Capture, Seizure, Arrest, Restraint or Detainment and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Should the F. C. and S. Clause as above be deleted, the following clause is to operate as part of this policy:—

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by Arrests, Restraints or Detainments of Kings, Princes or Peoples.

General average and salvage charges payable according to foreign statement or per York Antwerp rules if in accordance with the contract of affreightment.

Held covered, at a premium to be arranged, in case of deviation or change of voyage or of any omission or error in the description of the interest, vessel, or voyage.

Including transit by craft and or lighter to and from the vessel. Each craft and or lighter to be deemed a separate insurance. The Assured are not to be prejudiced by any agreement exempting lightermen from liability.

Including all liberties as per contract of affreightment. The Assured are not to be prejudiced by the presence of the negligence clause and or latent defect clause in the Bills of Lading and or Charter Party.

Warranted free from Particular Average unless the vessel or craft be stranded, sunk or burnt, but this Company is to pay the insured value of any package or packages which may be totally lost in loading, transhipment or discharge, also any loss of or damage to the interest insured which may reasonably be attributed to fire, collision or contact of the vessel and or craft and or conveyance with any external substance (ice included) other than water, or to discharge of cargo at a port of distress, also to pay landing, warehousing, forwarding and special charges if incurred for which Underwriters would be liable under a policy covering Particular Average.

Warranted that should the vessel and or craft ground within the limits of the Columbia and or Willamette and or Fraser Rivers and or Suez Canal and or Panama Canal and or Manchester Ship Canal or its connections, and or in the River Mersey above Rock Ferry Slip, and or in the River Plate (above Buenos Aires) and or its tributaries and or in the Danube, Demerara and or Bilbao River, and or on the Yenikale and or Bilbao Bar and or in any other canal, and or lying aground and or taking the ground in any harbor and or tidal water, any such grounding shall not be deemed a stranding, but this Company to pay for damage (subject to the terms of the policy) which may be proved to have directly resulted therefrom.

Notwithstanding anything to the contrary contained herein, this insurance is warranted free from any claim consequent upon deviation or loss of time whether arising from a peril of the sea or otherwise.

This insurance warranted to be in all cases null and void to the extent of any insurance by any carrier or bailee which would attach and cover said property if this policy had not been issued and to be null and void as concerns loss or damage by fire on land to the extent of any insurance against loss or damage by fire directly or indirectly covering upon the same property, whether prior or subsequent hereto in date, and it is also understood and agreed, that in case any agreement be made or accepted by the assured with any carrier or bailee by which it is stipulated that such or any carrier or bailee shall have in case of any loss for which he may be liable, the benefit of this insurance, or exemption in any manner from responsibility grounded on the fact of this insurance, then and in that event this Company shall be discharged of any liability for such loss hereunder, but this policy in these and all cases of loss or damage by perils insured against shall be liable and pay as (in any event) what cannot be collected from carriers and or bailees and or insurers of property lost or damaged, but also shall be chargeable with the direct pecuniary consequence to the assured temporarily arising from delay in collection from said carrier and or bailee and or insurers, and the advancing for that purpose only of funds to the assured for his protection pending such delay shall in no case be considered as affecting the question of the final liability of this insurance, and as soon as collection is made from the carrier and or bailees and or insurers, the right of the assured to hold the sums so advanced by this Company shall discontinue, and a portion thereof equal to the sum collected from the carrier and or bailee and or insurers, shall be repaid to this Company, but in case of final failure to collect from the carrier and or bailees and or insurers, a portion of the sums advanced by this Company equal to the sum short collected from the carrier and or bailees and or insurers may be retained and applied in settlement of the actual liability of this insurance thereby established (provided always the loss shall constitute in other respects a claim under this insurance). In the event of loss or damage this policy shall be null and void to the extent of any payment made by any carrier or bailee or insurers whether liable or not.

All questions of liability arising under this policy are to be governed by the laws and customs of England.

For convenience the words in italics have been printed instead of written, but for the sake of construction they are to be taken as though written.

THE STANDARD
MARINE INSURANCE COMPANY
LIMITED
OF LIVERPOOL, ENGLAND

Whereas, it hath been proposed to the **STANDARD MARINE INSURANCE COMPANY, Ltd.,** by

as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does, may or shall appertain, in part or in all, to make with the said Company the Insurance hereinafter mentioned and described.

Now This Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of

as a premium at and after the rate of

per cent for such insurance, the said Company takes upon itself the burthen of such Insurance to the amount of

and promises and agrees with the Insured, their Executors, Administrators and Assigns, in all respect truly to perform and fulfill the Contract contained in this Policy. AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company, so far as concerns this Policy shall be and is as follows, upon

laden (under deck) in the Ship or Vessel called the

Including clauses annexed hereto or contained in the margin hereof or stamped or written hereon; such clauses, if any, to control other printed conditions inconsistent with the same.

Loss, if any, payable to the order of the Assured in . In case of loss hereunder present this Policy for adjustment to at

This Policy is issued in Duplicate, one being accomplished the other to stand Null and Void.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said subject matter of this Policy from the time when the Goods or Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat, as above, and until the said Goods and Merchandise be discharged and safely landed at, as above, AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance. AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so insured as aforesaid, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever, Barratry of the Master and Mariners and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance, or any part thereof. AND in case of any Loss or Misfortune, it shall be lawful to the Insured, their Factors, Servants and Assigns to sue, labour and travel for, in and about the Defense, Safeguard and Recovery of the aforesaid subject matter of this Insurance, or any part thereof, without prejudice to this Insurance, the charges whereof the said Company will bear in proportion to the sum hereby insured. AND it is expressly declared and agreed that the acts of Insurer or Insured in recovering, saving or preserving the Property insured shall not be considered a waiver or acceptance of abandonment.

In Witness Whereof, the undersigned on behalf of the said STANDARD MARINE INSURANCE COMPANY, Limited, hereunto set their hands in Seattle, State of Washington,

this day of

J B F DAVIS & SON *General Agents*

By

6000—9.26

PRINTED IN U.S.A.

(Amended Libel—Cause No. 5538)

STATE OF WASHINGTON, COUNTY OF KING, ss.

W. R. Chesley, being first duly sworn, on oath deposes and says: That he is the Agent of A. Guthrie & Co., Inc., the above named Libellant; that he has read the foregoing libel, knows the contents thereof and believes the same to be true, and that he makes this affidavit on behalf of Libellant for the reason that none of the officers of said Libellant is now within the Western District of Washington.

W. R. CHESLEY.

Subscribed and sworn to before me this 3d day of February, 1927.

WILLIAM H. GORHAM,
Notary Public in and for the State of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

Feb. 4, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION
IN ADMIRALTY

No. 5538

A. GUTHRIE & CO., Inc.,
Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, Ltd., a corporation,
Respondent.

ANSWER

To the Honorable E. E. Cushman, Judge of the above entitled Court:

The answer of the Standard Marine Insurance Company, Ltd., Respondent above named, to the amended libel of A. Guthrie & Co., Inc., Libellant above named, in a cause of contract, civil and maritime, respectfully shows:

I.

Respondent admits the allegations of the first article of said amended libel.

II.

Respondent admits the allegations of the second article of said amended libel.

III.

Respondent has no knowledge or information sufficient to form a belief as to the ownership of the

(Answer—Cause No. 5538)
used camp equipment mentioned in the third article of said amended libel, and therefore does not admit ownership in said Libellant; however, it does admit all other allegations of said article.

IV.

Respondent admits the allegations of the fourth article of said amended libel.

V.

Respondent admits the allegations of the fifth article of said amended libel, but denies that said tug, with said barge, laden with said used camp equipment, "met with tempestuous weather and winds and waves which caused the barge to spill all of said Great Northern cars with all of said used camp equipment into the waters of Puget Sound and the same thereby became a total loss".

VI.

Respondent admits the allegations of the sixth article of said amended libel.

VII.

Answering the allegations of the seventh article of said amended libel, Respondent admits that Libellant presented in writing due notice and proof of said loss and made demand for payment of insurance, and that Respondent has at all times refused and still refuses to pay the amount of said insurance or any part thereof, but denies that there

(Answer—Cause No. 5538)

is now due and owing thereon from Respondent to Libellant the sum of $6100.00, or any sum at all.

VIII.

Answering the eighth article of said amended libel, Respondent admits the allegations thereof.

IX.

Respondent admits the allegations of the ninth article of said amended libel.

For a separate and affirmative defense the said Respondent alleges:

I.

That on the 2nd day of February, 1926, at the time when the locomotive crane and idler car mentioned in Libellant's amended libel were loaded on board the said barge Chesley No. 1 at Potlatch, Washington, the said barge was unseaworthy in that she was not tight, staunch and strong, but on the contrary leaked, admitting the entry of sea water into her holds to such an extent that said barge could not on said 2nd day of February, 1926, nor for a long time prior thereto carry an ordinary and reasonable load without being pumped out while on the voyage by the tug having said barge in tow; that said barge so loaded had to be so pumped out about every seven or eight hours.

II.

That at the time said barge sailed from Potlatch

(Answer—Cause No. 5538)
on the voyage mentioned in said amended libel she was unseaworthy for the reason that she was overloaded.

III.

That at the time said barge sailed from Potlatch on the voyage mentioned in said amended libel she was unseaworthy for the reason that she was laden with not only the locomotive crane upon its own wheels and said idler car, but also other railway cars heavily laden, none of which cars, (including the locomotive crane on its own wheels) were securely and adequately fastened upon said barge, in that their brakes were not set and they were allowed to rest, on rails laid upon and fastened to the deck of said barge, without jacks, shores, rail clamps or any of the other usual and necessary devices for securing and fastening such cars upon car barges for transportation upon voyages such as the one in question; that the failure to so adequately secure said cars rendered the same loose and liable to shift and go overboard on either the vessel taking water or meeting ordinary seas or winds.

IV.

That if said locomotive crane was lost overboard while upon said voyage it was lost because of the said unseaworthy condition of said barge, and/or said overloading of said barge, and/or said improper stowage of said barge.

(Answer—Cause No. 5538)

All and singular the premises are true.

WHEREFORE Respondent prays that the amended libel may be dismissed with costs, and for such other and further relief as may be just.

COSGROVE & TERHUNE,
Proctors for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—ss.

BRUNO HERMANN, being first duly sworn on his oath, deposes and says: That he is agent of the Respondent above named, and authorized to verify this answer on behalf of said Respondent; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

BRUNO HERMANN.

Subscribed and sworn to before me this 5th day of February, 1927.

(Seal) HOWARD G. COSGROVE.
Notary Public in and for the State of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

Sep. 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION
IN ADMIRALTY

No. 5538

A. GUTHRIE & CO., Inc.,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, Ltd., a corporation,

Respondent.

STIPULATION RELATING TO CONSOLIDATION, PLEADINGS AND TESTIMONY

It is hereby stipulated and agreed by and between the parties hereto:

(1) That this cause may be, for the purpose of trial, consolidated with Cause No. 5539 in this court, in admiralty, wherein Chesley Tug & Barge Co., a corporation, is Libellant, and the Standard Marine Insurance Company, Ltd., a corporation, is Respondent.

(2) That the interrogatories and answers to interrogatories propounded and returned in said cause No. 5539 shall be considered interrogatories and answers to interrogatories in this cause, with the same effect and force as if propounded and returned herein.

(3) That Article III of Respondent's separate and affirmative defense (set forth in its answer to Libellant's amended libel) may be amended by interlineation, adding after the word "that" in the seventh line of said article the words "their brakes were not set and,".

DATED at Seattle, Wash., this 19th day of September, 1927.

WILLIAM H. GORHAM,
Proctor for Libellant.

COSGROVE & TERHUNE,
Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

Sep. 28, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY
No. 5539

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

SECOND AMENDED LIBEL

To The Honorable E. E. Cushman, Judge of the above entitled court:

The second amended libel of Chesley Tug & Barge Company, a corporation, of Seattle, Washington, against the Standard Marine Insurance Company, Ltd., a corporation, of Liverpool, England, in a cause of contract, civil and maritime alleges as follows:

I.

That the Libellant during all the time herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington, and during all of said times owned the car-barge Chesley No. 1, without power,

(Second Amended Libel—Cause No. 5539)

and the tug Ketchikan II, and managed and operated said car-barge in connection with said tug as an agency for the public use in the conveyance of property for hire over and upon waters within the State of Washington as a common carrier under the Public Service Commission law of the State of Washington under a tariff schedule known and designated as C. T. B. Co. No. 6, W. D. P. W. No. 6, filed with and approved by the Public Service Commission of the State of Washington and kept open by Libellant to the public inspection under said Public Service Commission law.

II.

That the Respondent at all the times herein mentioned was and now is a corporation organized and existing under and by virtue of the laws of Great Britain, writing marine insurance and licensed and authorized by the State of Washington to do and doing a marine insurance business in the State of Washington and has complied with the statutes of the State of Washington relative to foreign insurance companies doing business within said state.

III.

That the City of Tacoma at all the times herein mentioned was and now is a municipal corporation of the first class within the County of Pierce in said State of Washington, and as such had, during

(Second Amended Libel—Cause No. 5539)

all of said times, and has all the rights and powers of a city of the first class of said state under and by virtue of the authority of the constitution and laws of the State of Washington.

IV.

That on or about May 25, 1925, and at all times thereafter material to this cause, Frank Sussman was doing business as Frank Sussman & Company at Tacoma, Washington, and was the owner of a certain locomotive crane on its own wheels then and there situated at Tacoma, Washington.

V.

That on or about May 25, 1925, said Frank Sussman doing business as aforesaid and said City of Tacoma acting by and through its lawful servants and representatives under and by virtue of Ordinance No. 8036 of said City of Tacoma, entitled "Ordinance No. 8036. An Ordinance authorizing the Commissioner of Light and Water to proceed with the construction of the first installation of hydroelectric power unit No. 2 of the City of Tacoma; provide for the issuance and sale of negotiable bonds of the City of Tacoma in the sum of $4,000,000.00 to pay the cost thereof; and creating and establishing a special fund for the payment of said bonds and the interest thereon", duly passed by the said City of Tacoma and published in the

(Second Amended Libel—Cause No. 5539)

manner and for the time prescribed by law, entered into an oral agreement whereby: Said Sussman rented said crane to said City of Tacoma for its own use and benefit in connection with the first installation of hydroelectric power unit No. 2 of its Cushman Power Project, so-called, under said Ordinance, at the monthly rental of $350.00 per month, to be paid by said City of Tacoma during the time said crane should be in its possession thereunder and until its redelivery to said owner at Tacoma, Washington; and whereby said City of Tacoma agreed to take delivery forthwith of said crane at Tacoma, Washington, for its use in connection with its said Cushman Power Project and to pay said rental to said owner for and during the time it should remain in possession of said crane and until its redelivery to said owner, and at its convenience to redeliver same to owner.

VI.

That said City of Tacoma on or about May 25, 1925, took delivery and possession of said crane and thereafter at all times up to the time of the loss thereof hereinafter mentioned remained in possession thereof and paid rent monthly to said Sussman therefor under said oral agreement, and during all of said times last aforesaid by virtue of its possession under said oral agreement it was the lawful

(Second Amended Libel—Cause No. 5539)
bailee thereof and as such had an insurable interest therein.

VII.

That on or about June 27, 1925, at Tacoma, Washington, said Frank Sussman doing business as aforesaid delivered his written offer of date June 27, 1925, to said City of Tacoma whereby said Frank Sussman doing business as aforesaid offered to sell said crane to said City of Tacoma for a valid consideration therein named, and whereby said Frank Sussman doing business as aforesaid granted said City of Tacoma an option to buy the same; which said offer and option was at all times thereafter up to the time of the said loss of said crane a valid and subsisting offer, unacted upon by Libellant's assignor, and by virtue thereof, together with its possession thereof as aforesaid, said City of Tacoma at all times subsequent to June 27, 1925, up to and including the time of said loss of said crane had an insurable interest in the same; a copy of which written offer is hereto attached marked Exhibit "A", hereby referred to and by such reference made a part hereof; and that said written offer was not based on any consideration running from said City of Tacoma to said Frank Sussman.

VIII.

That on or about February 2, 1926, at Potlatch, Washington, said City of Tacoma, the lawful bailee

(Second Amended Libel—Cause No. 5539)

of and in possession of said crane under said oral agreement for hire, with Libellant's consent, caused the same to be delivered to and laden on said car-barge Chesley No. 1, then and there being operated and managed in connection with said tug Ketchikan II by Libellant as a common carrier as an agency for public use in the transportation and conveyance of property for hire, as aforesaid, for transportation from Potlatch to Seattle under said tariff schedule No. 6, then and therein force; and at the same time an idler car, that is, a railway car designated B. & O. 253952, was as a necessary idler in connection with said crane on its own wheels as laden on said car-barge, delivered to and laden on said car-barge for transportation from Potlatch to Seattle.

IX.

That thereafter, on or about February 2, 1926, and at the request of said City of Tacoma, by certificate of insurance No. 74397, dated Seattle, February 2nd, 1926, and issued by Respondent, in consideration of the agreed premium to be paid to Respondent by said City of Tacoma, said Respondent insured Tacoma City Light Department, a department of said City of Tacoma, in the sum of Fifteen Thousand ($15,000.00) Dollars on said locomotive crane on its own wheels, including said idler car B. & O. 253952, valued at Fifteen Thousand

(Second Amended Libel—Cause No. 5539)

($15,000.00) Dollars laden on the said vessel or car-barge Chesley No. 1 in tow of said tug Ketchikan II, at and from Potlatch to Seattle, Washington, loss, if any, payable at Seattle to the assured or order upon surrender of said certificate properly endorsed and receipted, subject to the terms and conditions of the regular F. P. A. English form of cargo policy issued by said Respondent, in said certificate expressly referred to, wherein and whereby said Respondent agreed to indemnify said City of Tacoma against the adventures and perils of the sea and all other perils, losses and misfortunes that should come to the hurt, detriment or damage of said locomotive crane or said idler car, or any part thereof, and wherein and whereby it was expressly stipulated that said insurance was understood and agreed to be subject to English law and usage as to liabliity for and settlement of any and all claims; a copy of which certificate of insurance and of said F. P. A. English form of cargo policy are hereto attached, marked Exhibits "B" and "C", respectively, hereby referred to and by such reference expressly made a part hereof; and that by inadvertence and mistake Respondent in issuing said certificate of insurance failed to delete therefrom in the printed form thereof as issued to Libellant's assignor the express reference therein to an open policy, there being in fact no such open policy under which said certificate

(Second Amended Libel—Cause No. 5539)

was issued; and said contract of insurance as between assurer and assured being evidenced solely by said certificate of insurance and the regular F. P. A. English form of cargo policy expressly referred to therein.

That by inadvertence on the part of said City of Tacoma said idler car was by description included in and covered by said certificate of insurance when in truth and in fact said City of Tacoma had no insurable interest in said car.

That the total insurable value of said locomotive crane on its own wheels and said idler car, described in said certificate of insurance as the subject matter thereof, on February 2, 1926, and on the day of loss thereof, was the sum of Fifteen Thousand ($15,000.00) Dollars; and that the insurable value of said locomotive crane on its own wheels at said time was the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars or five-sixths of said total insurable value of fifteen thousand dollars; and that the insurable value of said idler car at said times was the sum of Two Thousand Five Hundred ($2,500.00) Dollars or one-sixth of said total insurable value of fifteen thousand dollars.

X.

That on February 2, 1926, said tug Ketchikan II departed from Potlatch, Washington, with said

(Second Amended Libel—Cause No. 5539)
car-barge in tow on her said voyage to Seattle, said locomotive crane on its own wheels and said idler car being laden on said car-barge as a part of her cargo and as part of the cargo of said car-barge operated in connection with and in tow of said tug; and thereafter and during the currency of said contract of insurance, to-wit: on February 3, 1926, and while said car-barge with said locomotive crane on its own wheels and said idler car laden on board thereof in tow of said tug as aforesaid was on her said voyage, in the waters of Puget Sound, said car-barge and said tug met with tempestuous weather, winds and waves which caused said car-barge to spill said crane and idler car into the waters of Puget Sound and the same thereby became a total loss.

XI.

That thereafter and in the month of February, 1926, said City of Tacoma tendered to said Respondent the sum of Sixty ($60.00) Dollars, lawful money of the United States, at Seattle, Washington, in full payment of the premium due under the terms of said contract of insurance.

XII.

That thereafter and in the month of February, 1926, said City of Tacoma presented to Respondent notice of claim and proof of said loss under said certificate of insurance, including claim for loss of

(Second Amended Libel—Cause No. 5539)

said idler car covered thereby as well as said locomotive crane on its own wheels; and thereafter, in the month of March, 1926, said City of Tacoma offered in writing to accept from Respondent the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars as covering the loss of said locomotive crane under said certificate of insurance, waiving any interest in the sum of Two Thousand Five Hundred ($2,500.00) Dollars insurance on said idler car; and thereafter on March 11, 1926, Respondent in writing to said City of Tacoma denied any and all liability under said certificate of insurance not only for said idler car but also for said locomotive crane; and thereafter in the month of July, 1926, Libellant as assignee of said certificate of insurance as hereinafter set forth presented in writing due notice, claim and proof of loss of said locomotive crane in the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars; but that Respondent has at all times refused and still refuses to pay to said City of Tacoma or to Libellant as assignee of said certificate of insurance the amount of said insurance under said certificate, or the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars thereof, or any part thereof, and there is now due and owing from Respondent to Libellant as assignee of said certificate of insurance the sum of Twelve Thousand Five Hundred

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($12,500.00) Dollars with interest thereon from February 3, 1926, at the rate of six per cent (6%) per annum.

XIII.

That pursuant to an ordinance of said City of Tacoma No. 8829 entitled: "An Ordinance authorizing and directing the City Comptroller to sell certificate of insurance No. 74397 of the Standard Marine Insurance Company, Ltd., of Liverpool, England, dated Seattle, February 2, 1926, issued to Tacoma City Light Department as the assured and covering locomotive crane on its own wheels, including idler car B. & O. 253952, and declaring that this ordinance shall take effect immediately after its publication," duly passed by said City of Tacoma on June 2, 1926, and thereafter, on June 4, 1926, duly published in the manner and for the time prescribed by law, and pursuant to public notice of sale thereunder given by the City Comptroller of the said City of Tacoma, said City Comptroller, at the hour of ten o'clock A. M. of June 16, 1926, at his office in the City Hall, in the City of Tacoma, State of Washington, sold all the right, title and interest of said City of Tacoma in and to said certificate of insurance and of all moneys due or to become due thereunder, to Libellant, Libellant then and there being the highest and best bidder for cash

(Second Amended Libel—Cause No. 5539)

in the sum of Seventy-Five Hundred ($7500.00) Dollars at said sale; and thereafter, on June 16, 1926, pursuant to said ordinance and in consideration of said sum of $7500.00 paid by Libellant to said City of Tacoma in lawful money of the United States, said City of Tacoma by endorsement thereon assigned and transferred and set over unto Libellant all right, title and interest of said City of Tacoma in and to said certificate of insurance and of all moneys due or to become due thereunder, subject to the terms and conditions in said ordinance prescribed, and thereafter, on June 16, 1926, delivered said certificate of insurance so assigned as aforesaid to Libellant, who ever since has been and now is the legal owner and holder thereof by virtue of said sale and assignment; a copy of which said assignment is hereby annexed marked Exhibit "D", hereby referred to and by such reference expressly made a part hereof.

XIV.

That the law and usage of England in force February 2, 1926, and at all times thereafter material to this action, provided, *inter alia*: As set forth in An Act to Codify the Law relating to Marine Insurance, of December 21, 1906, known as 6 Edw. 7 c. 41, the text of which Act is set forth at large in Appendix A, Arnould on Marine Insurance and

Average, 10th Ed., London. Stevens & Sons, Ltd., 119 and 120 Chancery Lane, W. C. 2; Sweet & Maxwell, Ltd., 3 Chancery Lane, W. C. 2; Law Publishers, 1921; and as set forth in the decisions and excerpts therefrom of the courts of law and equity, including courts of admiralty, of England, relating to marine insurance as the same appear in published Reports purporting to be Reports of the decisions of such courts, or of the United Kingdom of Great Britain and Ireland, later decisions prevailing over decisions of an earlier date, and decisions of appellate courts or tribunals including the House of Lords, sitting in a judicial capacity, and the Judicial Committee of the Privy Council, prevailing according to appellate jurisdiction, over the lower or inferior courts; and said Marine Insurance Act of 1906 prevailing over decisions of courts of an earlier date than December 21, 1906, in conflict therewith; reference to which acts and reports is hereby made and by such reference the same are expressly made a part hereof as though particularly pleaded herein.

XV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore Libellant prays that a monition in due form of law according to the practice of this

(Second Amended Libel—Cause No. 5539)

Honorable Court in causes of admiralty and maritime jurisdiction may issue against the Respondent herein citing it to appear and answer in the premises, and that a decree may be entered herein in favor of Libellant and against Respondent in the sum of Twelve Thousand Five Hundred ($12,500.00) Dollars, together with interest thereon from February 3, 1926, at the rate of six per cent per annum, and for Libellant's costs and disbursements in this action, and that the Court will grant to Libellant such other and further relief as in justice it may be entitled to receive.

CHESLEY TUG & BARGE CO.,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

June 27, 1925.

Mr. B. R. Nichols, Pur. Agt.,
Light Dept., City of Tacoma,
Tacoma, Washington.

Dear Sir:

We will sell to the City of Tacoma, the Link-Belt crane, now in the possession of the City at the Cushman Power Plant site, for a sum equivalent to the manufacturer's price for a new crane of like size and type, less five thousand dollars.

We hereby grant to the said City of Tacoma

(Second Amended Libel—Cause No. 5539)

an option on said crane, it being understood that should the city decide to buy the crane, we will allow any sums paid as rental on said crane for a period not to exceed six months to apply as part of the purchase price.

Yours very truly,

FRANK SUSSMAN & COMPANY,
By Frank Sussman.

EXHIBIT "A."

No. 74397 $ 15000.

COPY

Standard Marine Insurance Co., Ltd.

of Liverpool, England

CAPITAL $2,500.000

J. B. F. DAVIS & SON, Managers
San Francisco, Calif.

J. B. F. DAVIS & SON, Inc., Agents
211 214 Colman Building
Seattle, Wash.

[illegible]

Seattle, February 2nd, 1926.

THIS CERTIFIES that TACOMA CITY LIGHT DEPARTMENT is/are insured under and subject to the conditions of open Policy No. - - - - - - - Entry No. 74397 of

Standard Marine Insurance Company (Limited)

in the sum of Fifteen Thousand and No/100 - - - - - - - - - - - - - - - - Dollars

On Locomotive Crane on its own wheels, including Idler Car BAO 253952.

Valued at Fifteen Thousand and No/100 - - - - - - - - - - - - - - - - Dollars

Laden (under deck) in the Ship or Vessel called the Chesley Car Barge No. 1 in tow of Tug "KETCHIKAN" 2/1- - - - - -

At and from Potlatch - - - - - - - - - to Seattle - - - - - - - - - - - -

Loss, if any, payable in Seattle - - - - - - - to Assured

or order, upon surrender of this Certificate properly endorsed and receipted.

Subject to the terms and conditions of the regular F. P. A. English form of Cargo Policy issued by this Company.

COPY

J. B. F. Davis & Son
AGENTS

In case of loss hereunder, present this certificate for adjustment to

Agent of this Company at J. B. F. DAVIS & SON, 211-212 COLMAN BLDG., TELEPHONE MAIN 2676

Warranted free from Particular Average unless directly caused by the vessel being stranded, sunk, burnt, or in collision with another ship or vessel.

Warranted free from claim for salvage by towing vessel.

This insurance is understood and agreed to be subject to English Law and usage as to liability for, and settlement of, any and all claims.

All Certificates issued abroad and made payable in the United Kingdom are required by law to have a Government Stamp affixed within ten days after date of receipt in the United Kingdom. Warranted free of loss or damage caused by strikers, locked out workmen or persons taking part in labor disturbances or riots or civil commotions. Warranted free of Capture, Seizure, Arrest, Restraint or Detainment and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

In case of loss or damage to any part of a machine consisting when complete for sale or use of several parts, this Company shall only be liable for the insured value of the part lost or damaged and amounting to a claim [illegible]

Exhibit B

(S
ar
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of

NO.

COPY

AMOUNT

[illegible]

All questions of liability arising under this policy are to be governed by the laws and customs of England.

For convenience the words in italics have been printed instead of written, but for the sake of construction they are to be taken as though written.

THE STANDARD MARINE INSURANCE COMPANY

LIMITED

OF LIVERPOOL, ENGLAND

Whereas, it hath been proposed to the **STANDARD MARINE INSURANCE COMPANY, Ltd.,** by

as well in his or their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this Policy does, may or shall appertain, in part or in all, to make with the said Company the Insurance hereinafter mentioned and described.

Now This Policy Witnesseth that in consideration of the said person or persons effecting this Policy promising to pay to the said Company the sum of

as a premium at and after the rate of

per cent. for such insurance, the said Company takes upon itself the burthen of such Insurance to the amount of

and promises and agrees with the Insured, their Executors, Administrators and Assigns, in all respect truly to perform and fulfill the Contract contained in this Policy, AND it is hereby agreed and declared that the said Insurance shall be and is an Insurance (lost or not lost) at and from

AND it is also agreed and declared that the subject matter of this Policy as between the Insured and the said Company, so far as concerns this Policy shall be and is as follows, upon

laden (under deck) in the Ship or Vessel called the

Including clauses annexed hereto or contained in the margin hereof or stamped or written hereon; such clauses, if any, to control other printed conditions inconsistent with the same.

Loss, if any, payable to the order of the Assured in . In case of loss hereunder present this Policy for adjustment to at

This Policy is issued in Duplicate, one being accomplished the other to stand Null and Void.

AND the said Company promises and agrees that the Insurance aforesaid shall commence upon the said subject matter of this Policy from the time when the Goods or Merchandise shall be laden on board the said Ship or Vessel, Craft or Boat, as above, and until the said Goods and Merchandise be discharged and safely landed at, as above, AND that it shall be lawful for the said Ship or Vessel in the Voyage so insured as aforesaid to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this Insurance, AND touching the Adventures and Perils which the said Company is content to bear and does take upon itself in the Voyage so insured as aforesaid, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Assailing Thieves, Jettisons, Letters of Mart and Counter Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People of what Nation, Condition or Quality soever, Barratry of the Master and Mariners and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the aforesaid subject matter of this Insurance, or any part thereof; AND in case of any Loss or Misfortune, it shall be lawful to the Insured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defense, Safeguard and Recovery of the aforesaid subject matter of this Insurance, or any part thereof, without prejudice to this Insurance, the charges whereof the said Company will bear in proportion to the sum hereby insured; AND it is expressly declared and agreed that the acts of Insurer or Insured in recovering, saving or preserving the Property insured shall not be considered a waiver or acceptance of abandonment.

In Witness Whereof, the undersigned on behalf of the said STANDARD MARINE INSURANCE COMPANY, Limited, hereunto set their hands in Seattle, State of Washington,

this day of

J. B. F. DAVIS & SON, *General Agents.*

By..

4000—9.26
PRINTED IN U. S. A.

(64/39)

EXHIBIT "C"

Endorsement on Certificate of Insurance No. 74397 issued by Standard Marine Insurance Company, Ltd., at Seattle, February 2, 1926, to Tacoma City Light Department as assured:

For value received, the City of Tacoma hereby assigns, transfers and sets over unto the Chesley Tug & Barge Company, a corporation, of Seattle, Washington, all the right, title and interest of the City of Tacoma in and to the within certificate of insurance and of all moneys due or to become due thereunder. And it is expressly stipulated that the assignee of this certificate of insurance may at its option in its own name or in the name of the City of Tacoma, but at its sole and exclusive cost and expense, institute and prosecute to final judgment or decree any and all suits and proceedings in any and all courts thereunder against the insurer under said certificate of insurance.

This assignment is subject to all the terms and conditions of Ordinance No. 8829 of the City of Tacoma, passed June 2, 1926.

IN WITNESS WHEREOF, the City of Tacoma has executed this assignment by its officers thereunto duly authorized this 16th day of June, 1926.

CITY OF TACOMA.

By M. G. TENNANT,

Mayor.

Attest:

GENEVIEVE MARTIN,

City Clerk.

Countersigned this 16th day of June, 1926.

CARL G. CADDEY,

(Corporate Seal) City Comptroller.

By P. H. PALMER,

Deputy.

EXHIBIT "D."

STATE OF WASHINGTON, COUNTY OF KING—ss.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is the duly elected, qualified and acting President of the Chesley Tug & Barge Company, a corporation, the above named Libellant; that he has read the foregoing Second Amended Libel, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 30th day of October, 1926.

WILLIAM H. GORHAM,

Notary Public in and for the State of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

November 1, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON.
SOUTHERN DIVISION.
IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE CO., a corporation,
Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,
Respondent.

EXCEPTIONS TO AMENDED LIBEL.

Comes now the above named Respondent, by its proctors, Cosgrove & Terhune, and excepts to the amended libel of the Chesley Tug & Barge Co. herein, in the following particulars:

I.

Articles V and VI of Libellant's amended libel do not state facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the locomotive crane mentioned in said libel at the time said locomotive crane is therein asserted to have been lost, to-wit: on February 3, 1926.

II.

Article VII of said amended libel is insufficient, indistinct and lacking in fullness, in that, while it alleges that the offer therein mentioned was a valid

and subsisting offer (which is not an allegation of fact, but on the contrary a conclusion of law), it does not assert that said offer was given for a consideration, or that the said City of Tacoma did at any time accept said offer.

III.

Article VII of said amended libel does not allege facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the said locomotive crane at the time of its said alleged loss.

IV.

That said amended libel does not allege facts sufficient to show an insurable interest in the City of Tacoma, alleged assignor of Libellant, in and to the locomotive crane mentioned in said libel at the time it is asserted to have been lost, or at any other time.

V.

That said amended libel does not state facts sufficient to constitute a cause of action.

COSGROVE & TERHUNE,

Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

October 9, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
SOUTHERN DIVISION.
IN ADMIRALTY.
No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto that the exceptions of Respondent to the amended libel herein may stand as and for Respondent's exceptions to the second amended libel herein with the same force and effect as though expressly addressed to said second amended libel.

Dated, Seattle, Washington, October 30, 1926.

WILLIAM H. GORHAM,
Proctor for Libellant.

COSGROVE & TERHUNE,
Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.
November 1, 1926.
Ed. M. Lakin, Clerk.
By E. Redmayne, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON,

SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

MEMORANDUM RULING ON EXCEPTIONS TO SECOND AMENDED LIBEL.

FILED NOV. 18, 1926.

WILLIAM H. GORHAM, Seattle,
Proctor for Libellant.

COSGROVE & TERHUNE, Seattle,
Proctors for Respondent.

CUSHMAN, (D. J.)

This suit is one in admiralty to recover upon a policy of marine insurance. The second amended libel alleges that by inadvertence and mistake the Respondent in issuing the certificate of insurance failed to delete from the printed form issued, the reference therein to an open policy; that the contract of insurance was evidenced solely by a certificate of insurance and the regular F. P. A. English form cargo policy. A part of the prayer is for such other and further relief as in justice Libellant may be entitled to receive.

From the foregoing it would appear Libellant seeks to have the contract of insurance reformed—that is, seeks equitable relief. I find nothing in the briefs touching the jurisdiction of the Court, in admiralty, to reform a contract, neither do I recall anything having been said upon that point in the argument. Before considering further the Exceptions to the Libel, the Court wishes to be advised as to the contention of the parties herein upon this question, and the case will be noted for hearing upon the point by either Libellant or Respondent; and the Clerk will notify them of this ruling.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

STIPULATION.

It is hereby stipulated by the parties hereto:

FIRST: That for all purposes touching questions of law and of fact in the above entitled cause

the certificate of insurance and the regular F. P. A. English form of cargo policy, copies of which are referred to in and attached to the second amended libel in said cause as Exhibit "B" and Exhibit "C" respectively, constitute the entire contract of marine insurance alleged in said second amended libel; and that, notwithstanding the express reference in said certificate of insurance to an open policy, there never was any open policy issued or intended to be issued touching the insurance effected by said contract of marine insurance.

SECOND: That said second amended libel may be deemed as amended in accordance with the first paragraph of this stipulation.

THIRD: That no reformation of said contract shall be required or deemed necessary in said cause.

Dated November 26, 1926.

WILLIAM H. GORHAM,
Proctor for Libellant.

COSGROVE & TERHUNE,
Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

November 27, 1926.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

MEMORANDUM DECISION OVERRULING EXCEPTIONS TO SECOND AMENDED LIBEL.

FILED JAN. 21, 1927.

WILLIAM H. GORHAM, Seattle,
Proctor for Libellant.

COSGROVE & TERHUNE, Seattle,
Proctors for Respondent.

CUSHMAN, (D. J.)

The second amended libel has been, by stipulation, amended. This stipulation was made to meet the Court's question concerning jurisdiction—a question raised after argument of exceptions to the amended libel. This amendment by stipulation, as the Court understands, in no way interferes with the Court now ruling upon the exceptions argued and submitted.

Libellant cites: *The Fred E. Sander,* 212 Fed. 545, 6 Edw. 7, c. 41; *Lucena vs. Craufurd* (H. of L. 1806, 2 B. & F. 268, 302); *Hooper vs. Robinson,* 98 U. S. 528; *Phoenix Ins. Co. vs. Trans. Company,* 117 U. S. 312; *Harrison vs. Fortlage,* 161 U. S. 57; *Cooley's Briefs on Insurance,* 147-48; 21 Cyc. 557; *Munich Ins. Co. vs. Dodwell,* 128 Fed. 410; *Willamette Navigation Co. vs. Hartford Fire Ins. Co.,* 287 Fed. 464; *Fireman's Fund Ins. Co. vs. Globe Navigation Co.,* 236 Fed. 618; *Arnold on Marine Ins.,* 10 Ed. p. 501; *Eldridge on Marine Policies* (1924), p. 211; *City of Detroit vs. Detroit Ry. Co.,* 172 Mich. 314, 139 N. W. 56; *Crowley vs. Cohen,* 3 B & Ad., 478; *Eastern Railway Co. vs. Relief Fire Ins. Co.,* 98 Mass. 420.

Respondent cites: Admiralty Rule No. 22, Sup. Court, 38 C. J. 1172 (51-52); *M. S. Dollar S. S. Co. vs. Maritime Ins. Co.,* 149 Fed. 616; *Colburn vs. Washington State Art Assn.,* 80 Wash. 662; Subsection 1 of Sec. 5 of the English Marine Act, 1908; *Arnould on Marine Ins.* (10th Ed.), p. 1673; 6 C. J. 1122 (68), 1123 (70-71-72-73-74); *Sanderson vs. Collins* (1904), 1 K. B. 628; *McMahon vs. Field,* 7 Q. B. D., 591; *Batut vs. Hartley,* L. R. 7, Q. B. 594; *Firestone Tire & Rubber Co. vs. Pacific Transfer Co.,* 120 Wash. 665; *Williams vs. Lloyd* (1628), 82 E. R. 95; *Bird vs. Astock,* 2 Bulstroda 280, 80 reprint 1122; *Taylor vs. Caldwell* (1863), 32 L. J.

Q. B. 164, 8 L. T. 356; *Horlock vs. Beal* (1916), 1 A. C., p. 486; *Gow on Marine Ins.*, p. 78; *Wood on Fire Ins.*, 2nd Ed. 673.

In support of the ~~exemptions~~ exceptions it is urged that no insurable interest on the part of the Libellant's assignor is shown. The exceptions are overruled. *Phoenix Ins. Co. vs. Transportation Company*, 117 U. S. 312 to 323; *Munich Ins. Co. vs. Dodwell*, 128 Fed. 410; *Willamette Nav. Co. vs. Hartford Fire Ins. Co.*, 287 Fed. ~~[illegible]~~. 464.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

January 21, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

ORDER OVERRULING EXCEPTIONS TO AMENDED LIBEL.

This cause having come on regularly to be heard on Respondent's exceptions to the amended libel herein as further amended by stipulation of the parties dated November 26, 1926, filed herein,

The Court having heard argument of counsel for the respective parties and being fully advised in the premises,

IT IS ORDERED that said exceptions be and the same are hereby overruled; to which ruling of the Court Respondent excepts and its exception is allowed.

Dated, February 14th, 1927.

EDWARD E. CUSHMAN,
Judge.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

February 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

ANSWER.

To the Honorable E. E. Cushman, Judge of the above entitled Court:

The answer of the Standard Marine Insurance Company, Ltd., Respondent above named, to the second amended libel of Chesley Tug & Barge Company, Libellant above named, in a cause of contract, civil and maritime, respectfully shows:

I.

Respondent admits the allegations of the first article of the second amended libel herein.

II.

Respondent admits the allegations of the second article of the second amended libel herein.

III.

Respondent admits the allegations of the third article of the second amended libel herein.

(Answer—Cause No. 5539)

IV.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fourth article of the second amended libel herein.

V.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the fifth article of the second amended libel herein.

VI.

Respondent denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the sixth article of the second amended libel herein; however, the said respondent alleges that if the said City of Tacoma was the bailee for hire of said crane, as alleged by Libellant, that the said City of Tacoma had ceased using and did not intend further to use said crane for the purpose for which it was bailed, and was at the time of its alleged loss returning the said crane to the alleged bailor.

VII.

Respondent denies the allegations of the seventh article of said second amended libel.

VIII.

Answering the eighth article of said second amended libel Respondent admits that the said City

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of Tacoma on or about February 2, 1926, then being the bailee for hire of said crane and in possession thereof, caused the same to be delivered to and laden upon the said car-barge Chesley No. 1, then and there being operated as alleged, and for transportation from Potlatch to Seattle as alleged, and further that there was also delivered to and laden upon said car-barge an idler as alleged. All other allegations in said article are denied.

IX.

Respondent admits all of the allegations of the first paragraph of the ninth article of said second amended libel, except the allegation "that by inadvertence and mistake Respondent in issuing said certificate of insurance failed to delete therefrom in the printed form thereof as issued to Libellant's assignor the express reference therein to an open policy," which said quoted allegation respondent denies.

Respondent admits the allegations of the second paragraph of the ninth article of said second amended libel.

Respondent denies each and every allegation of the last paragraph of said ninth article, and particularly that the insurable value of said locomotive crane on its own wheels at the time mentioned in

(Answer—Cause No. 5539)

said paragraph was the sum of $12,500.00, or any sum greater than $7,500.00.

X.

Respondent admits the allegations of the tenth article of said second amended libel, except that it denies that "said car-barge and said tug met with tempestuous weather, winds and waves which caused said car-barge to spill said crane and idler car into the waters of Puget Sound and the same thereby became a total loss."

XI.

Respondent admits the allegations of the eleventh article of said second amended libel.

XII.

Respondent admits the allegations of the twelfth article of said second amended libel, except, however, that it denies that "there is now due and owing from Respondent to Libellant as assignee of said certificate of insurance the sum of $12,500.00," or any sum at all.

XIII.

Respondent denies the allegations of the thirteenth article of said second amended libel.

XIV.

Respondent admits the allegations of the fourteenth article of said second amended libel.

XV.

Respondent admits the allegations of the fifteenth article of said second amended libel.

(Answer—Cause No. 5539)

For a separate and affirmative defense the said Respondent alleges:

I.

That on the 2nd day of February, 1926, at the time when the locomotive crane and idler car mentioned in Libellant's second amended libel were loaded on board the said barge Chesley No. 1 at Potlatch, Washington, the said barge was unseaworthy in that she was not tight, staunch and strong, but on the contrary leaked, admitting the entry of sea water into her holds to such an extent that said barge could not on said 2nd day of February, 1926, nor for a long time prior thereto carry an ordinary and reasonable load without being pumped out while on the voyage by the tug having said barge in tow; that said barge so loaded had to be so pumped out about every seven or eight hours.

II.

That at the time said barge sailed from Potlatch on the voyage mentioned in said second amended libel she was unseaworthy for the reason that she was overloaded.

III.

That at the time said barge sailed from Potlatch on the voyage mentioned in said second amended libel she was unseaworthy for the reason that she was laden with not only the locomotive crane upon

(Answer—Cause No. 5539)

its own wheels and said idler car, but also other railway cars heavily laden, none of which cars, (including the locomotive crane on its own wheels) were securely and adequately fastened upon said barge, in that their brakes were not set and they were allowed to rest on rails laid upon and fastened to the deck of said barge, without jacks, shores, rail clamps or any of the other usual and necessary devices for securing and fastening such cars upon car barges for transportation upon voyages such as the one in question; that the failure to so adequately secure said cars rendered the same loose and liable to shift and go overboard on either the vessel taking water or meeting ordinary seas or winds.

IV.

That if said locomotive crane was lost overboard while upon said voyage it was lost because of the said unseaworthy condition of said barge, and/or said overloading of said barge, and/or said improper stowage of said cargo.

All and singular the premises are true.

WHEREFORE respondent prays that the second amended libel may be dismissed with costs, and for such other and further relief as may be just.

COSGROVE & TERHUNE,
Proctors for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—ss.

BRUNO HERMANN, being first duly sworn on his oath, deposes and says: That he is agent of the Respondent above named, and authorized to verify this answer on behalf of said Respondent; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

BRUNO HERMANN.

Subscribed and sworn to before me this 14th day of February, 1927.

HOWARD G. COSGROVE,
Notary Public in and for the State
(Seal) of Washington, residing at Seattle.

INTERROGATORIES PROPOUNDED TO LIBELLANT TO BE ANSWERED BY ONE OF ITS OFFICERS UNDER OATH.

1. When was the barge Chesley No. 1 built, give her construction, tonnage (gross and net), and dimensions?

2. (a) Please list all of the voyages of said barge between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded.

(b) Please give the name of the tug towing said barge on each of said voyages, give also the name of the then owner and master of each of said tugs.

(Interrogatories—Cause No. 5539)

(c) What weather did said barge encounter on each of said voyages?

(d) Did barge take water on any of these voyages? If so, what voyages, and how much water and under what circumstances.

(e) Did barge have to be pumped out during the period of November 1, 1925, to February 2, 1926? If so, when?

(f) Did said barge have to be pumped out on any of said voyages? If so, upon what voyage, and when, and by what means was said pumping accomplished? How long did each of said pumping operations take?

(g) Please produce at the trial of this action the original log books covering said voyages of each of the tugs towing said barge upon said voyages, attach hereto the copies of all entries in said log books relating to said voyages, giving the names and addresses of persons making such entries.

3. When was barge last caulked prior to February 2, 1926, what was the extent and character thereof, and by whom and where done?

4. When and where was said barge last on drydock prior to February 2, 1926? For what purpose was she on such drydock, and what was thereon done to said barge?

5. What collisions, strandings or accidents befell said barge during or upon any of said voyages,

(Interrogatories—Cause No. 5539)

or during said period of time; give detailed statement of effect thereof upon her hull, timbers and caulking?

6. What was done by way of hull repairs to said barge during said period, when and by whom?

7. (a) Of what did the cargo of the barge consist on the voyage beginning February 2, 1926, at Potlatch, Washington; if it consisted of railway cars, how many were there, what sizes and weights, and with what were they loaded; what was the approximate total weight of said cars and other cargo?

(b) How and where were said cars placed on said barge? The term "cars" used in this interrogatory includes said crane and idler.

(c) How were they fastened or secured to said barge in order to prevent their rolling or shifting?

(d) Were said cars secured with shores?

(e) Were said cars secured with jacks?

(f) Were said cars secured with rail clamps?

(g) If your answer is that said cars were secured with shores, jacks and/or rail clamps please describe the same, and state how many there were and where placed.

8. (a) Please produce at the time of trial the original log book of the tug Ketchikan II, showing all voyages made by the said Ketchikan II during

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the period of November 1, 1925, to and including February 4, 1926, and attach hereto copies of all entries in said log books relating to any and all of said voyages.

(b) Upon said voyage beginning February 2, 1926, was said barge manned? If so, how, and by whom; did it have any pumping equipment of its own.

COSGROVE & TERHUNE,
Proctors for Respondent.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.
February 15, 1927.
Ed. M. Lakin, Clerk.
By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF WASHINGTON,
NORTHERN DIVISION.

IN ADMIRALTY.

No. 5539.

CHESLEY TUG & BARGE COMPANY,
a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD., a corporation,

Respondent.

ANSWER OF LIBELLANT TO INTERROGATORIES PROPOUNDED BY RESPONDENT.

Answer to Interrogatory No. 1:

Built in 1913.

Construction: Wooden barge with 5 solid bulkheads and 5 trusses.

Tonnage: 193 gross and net.

Dimensions: 90′ x 36′ x 7′,
Custom House measurement.
90′ x 36′ x 7′ 8″ over-all.

Answer to Interrogatory No. 2:

(a) Voyages of Chesley No. 1 between November 1, 1925, and February 2, 1926, ports of departure and destination, dates of sailing and cargoes, are as follows:

SCOW CHESLEY NO. 1—Nov. 1st, 1925, to Feb. 3rd, 1926.

1925 No.	Date Depart.	Arrival	Cargo	From	To	Tug
2598	11-4-9 A.M.	11-5-6 A.M.	4 cars	Seattle	Potlatch	Tempest
	11-6 A.M.	11	3 cars	Potlatch	Seattle	Tempest
2610	11-8-1 P.M.	11-9-3 P.M.	4 cars	Seattle	Potlatch	Ketchikan
	11-10-11 A.M.	11-10-10:20 P.	4 cars	Potlatch	Seattle	{ Ketchikan V. Grubb
2616	11-12-11:30 P.	11-13	2 cars	Seattle	Mud Bay	Tempest
	11-15-7 P.M.	11-16-7 A.M.	1 car	Mud Bay	Seattle	Tempest
2625	11-17-Noon	11-18	2 cars	Seattle	Potlatch	Tempest
	11-19-4 A.M.	11-20-2 A.M.	2 cars	Potlatch	Seattle	Tempest
2643	11-26-1 A.M.	11-26-11 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	11-27 P.M.	11-28 P.M.	4 cars	Poulsbo	Seattle	Ketchikan
2653	11-29-1 A.M.	11-29-6 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	12-3	12-4-11:30 A.	4 cars	Poulsbo	Seattle	Tempest
2664	12-6-6 A.M.	12-7-7 A.M.	1 Loco.	Seattle	Dry Creek	Tempest
			3 cars	Dry Creek	Potlatch	Tempest
	12-9-10 A.M.	12-9-11 P.M.	4 cars	Potlatch	Seattle	Tempest
2674	12-11-1 A.M.	12-12-Noon	3 cars	Seattle	Dry Creek	Tempest
	12-13-3 A.M.	12-13-P.M.	0 cars	Dry Creek	Seattle	Tempest
2677	12-15-3 A.M.	12-16-5 P.M.	6 cars	Seattle	Dry Creek	Tempest
	12-17-5 A.M.	12-17-9 P.M.	3 cars	Dry Creek	Seattle	Tempest

2687	12-19 P.M.	12-20-7 P.M.	5 cars	Seattle	Potlatch	Tempest
	12-23 P.M.	12	4 cars	Potlatch	Seattle	Tempest
2708	12-28-2 P.M.	12-29-6 A.M.	3 cars	Seattle	Dry Creek	Tempest
	12-30-5 A.M.	12-30-6 P.M.	3 cars	Dry Creek	Seattle	Tempest
2709	12-31-11 A.M.	1-1 A.M.	3 cars	Seattle	Dry Creek	Tempest
	1926					
1926						
No.						
	1-1 P.M.	1-2 P.M.	3 cars	Dry Creek	Seattle	Tempest
25	1-3-1 P.M.	1-4-2:30 P.M.	6 cars	Seattle	Mud Bay	Tempest
	1-6-11 A.M.	1-7-12:20P.M.	Empty	Mud Bay	Seattle	Ketchikan
31	1-29-2 A.M.	1-29-7 A.M.	4 cars	Seattle	Port Orchard	Ketchikan
	1-29-4 A.M.	1-29-7 P.M.	0 cars	Port Orchard	Seattle	Ketchikan
32	1-7-11 P.M.	1-9-1 A.M.	5 cars	Seattle	Potlatch	Lillico No. 2
	1-9-10 A.M.	1-10-2 A.M.	0 cars	Potlatch	Seattle	Lillico No. 2
33	1-14-4 A.M.	1-15-6 A.M.	4 cars	Potlatch	Seattle	Ketchikan
34	1-17-6 A.M.	1-18 A.M.	6 cars	{ Seattle { Potlatch	{ Potlatch { Dry Creek	Ketchikan Ketchikan
	1-20-9 A.M.	1-22-1 A.M.	4 cars	Dry Creek	Seattle	Ketchikan
35	1-25-2 A.M.	1-26	6 cars	Seattle	Potlatch	Ketchikan
	1-27-11 A.M.	1-28-4 A.M.	4 cars	Potlatch	Seattle	Ketchikan
44	1-31-8 A.M.	2-1 A.M.	6 cars	Seattle	Potlatch	Ketchikan
	2-2-5:30 A.M.	2-3-8 A.M.	5 cars 1 Loco. Crane	Potlatch	{ Lost off { Meadow Point	Ketchikan

Answer to Interrogatory No. 2—Continued:

(b) Names of tugs, their owners and masters, towing on said voyages, are as follows:

Tug Ketchikan II.

Owners: Libellant.

Master: Nelson,

Address, care Libellant.

Tug Tempest.

Owners: Libellant.

Master: McDevitt, now deceased.

Tug Lillico No. 2.

Owner: Lillico Tug & Barge Co.

Master: Bert Thomas,

Address unknown.

(c) Unknown to Libellant.

(d) Not to Libellant's knowledge.

(e) Not to Libellant's knowledge.

(f) Not to Libellant's knowledge.

(g) Log book of Ketchikan II from January 16, 1926, to February 2, 1926, and log book of tug Tempest from November 9, 1925, to February 2, 1926, now at office of proctor for Libellant subject to inspection by Respondent and its proctor.

Present whereabouts of log book of tug Ketchikan II from November 1, 1925, to January 15, 1926, unknown to Libellant.

Names and addresses of persons making entries in said log books unknown to Libellant except as follows: Names and addresses of Masters of Ketchikan II and Tempest given in Answer to Interrogatory No. 2 (b).

Answer to Interrogatory No. 3:

October, 1923.

By Maritime Boat & Engine Works, Seattle, Washington.

Extent and character, see Answer to Interrogatory No. 4.

Answer to Interrogatory No. 4:

October, 1923.

Hauled, scraped, cleaned, scrubbed and copper painted bottom; took out nine planks in bottom and replaced, caulked and cemented seams; put on four planks and guards for chafing strake head end; took out piece of head log and replaced with new; took off rails and put on sheathing and replaced rails; took off rake guards and replaced; made new plug, took off, straightened and replaced corner irons; made new combing around hatches forward end; hawsed in and filled seams, and caulked where found necessary.

Answer to Interrogatory No. 5:

No collisions, strandings or accidents.

Answer to Interrogatory No. 6:

No hull repairs other than as shown in Answer to Interrogatory No. 4, except incidental repairs from time to time as occasion required.

Answer to Interrogatory No. 7:

(a) Locomotive crane on its own wheels, weight .... 63 tons

5 railway cars, weight each .... 20 tons

1 car empty.

1 car containing goods, weight, exclusive of car .... 42 tons

1 car containing goods, weight, exclusive of car .... 19 tons

1 car containing goods, weight, exclusive of car .... 8 tons

1 car containing goods, weight, exclusive of car .... 38 tons

(b) Crane and idler (empty railway car) placed on center track.

2 railway cars on each outside track.

(c) Across the after end was a 4x16 timber with a 12x12 timber on top bolted to the barge with several 1″ bolts and four 1½″ anchor bolts with 6″ washers on them, in front of that another 12x12 timber, and in front of that, between that 12x12 timber and the wheels of the cars, would be usual railroad ties which were about 7x9 or

8x8 timbers to fill in the space between the 12x12 timber and the wheels of the car. On the other end of the scow we used timbers or a railroad tie across the track and another 8x8 timber or railroad tie under the journals of the car wedged in place with ship wedges, on each side.

(d) No.

(e) No.

(f) No.

(g) See above.

Answer to Interrogatory No. 8:

(a) See Answer to Interrogatory No. 2 (g).

(b) Barge not manned.

No pumping equipment of its own.

CHESLEY TUG & BARGE COMPANY,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—ss.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is the President of Libellant corporation within named; that he has read the foregoing answers, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 28th day of June, 1927.

Notary Public in and for the State
(Seal) of Washington, residing at Seattle.
WILLIAM H. GORHAM,

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

December 14, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

No. 5539.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, LTD.,

Respondent.

FURTHER ANSWER OF LIBELLANT TO INTERROGATORIES PROPOUNDED BY RESPONDENT.

Comes now the Chesley Tug & Barge Company, above named Libellant, and further answering subdivision C of the seventh interrogatory propounded by respondent, says:

That said railway cars and said crane and idler car were further fastened or secured to said barge as follows:

Said locomotive crane on its own wheels, coupled to said idler car, was placed on the center track of said car barge and against said 7x9 or 8x8 timbers, said idler car being forward of the crane; and the brakes of all said railway cars and said idler car, as spotted on said car barge, were set by air and by hand.

CHESLEY TUG & BARGE COMPANY,
Libellant.

WILLIAM H. GORHAM,
Proctor for Libellant.

STATE OF WASHINGTON, COUNTY OF KING—ss.

W. R. CHESLEY, being first duly sworn, on oath deposes and says: That he is President of the Libellant corporation within named; that he has read the further foregoing answer, knows the contents thereof and believes the same to be true.

W. R. CHESLEY.

Subscribed and sworn to before me this 19th day of December, 1927.

William H. Gorham,
Notary Public in and for the State
(Seal) of Washington, residing at Seattle.

Endorsed.

Filed in the United States District Court, Western District of Washington, Southern Division.

December 22, 1927.

Ed. M. Lakin, Clerk.

By E. Redmayne, Deputy.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

IN ADMIRALTY.

No. 5538.

A. GUTHRIE & COMPANY, Inc.,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, Ltd., a corporation,

Respondent.

No. 5539.

CONSOLIDATED FOR TRIAL.

CHESLEY TUG & BARGE COMPANY, a corporation,

Libellant,

vs.

STANDARD MARINE INSURANCE COMPANY, Ltd., a corporation,

Respondent.

BE IT REMEMBERED that heretofore and on to-wit, December 27, 1927, the above entitled causes came regularly on for trial in the above Court, and before the Honorable Edward E. Cushman, Judge of said Court, sitting without a jury;

The Libellants appearing by Mr. William H. Gorham, their proctor;

The Respondent appearing by Mr. Howard G. Cosgrove of Messrs. Cosgrove & Terhune, its proctor;

AND THEREUPON the following proceedings were had and done, to-wit:

THE COURT: Is the case of A. Guthrie & Company consolidated with the case of Chesley Tug & Barge Company?

MR. GORHAM: Yes, if Your Honor please, they are two cases consolidated.

THE COURT: Are the parties ready in both cases?

MR. GORHAM: The parties are ready in both cases, if Your Honor please.

MR. COSGROVE: Yes, sir.

THE COURT: Very well. You may make a statement. The statement you are making is in which case?

MR. GORHAM: The statement will be in both cases, if Your Honor please. Before making a statement I desire to have the record show that counsel consents to amending the amended libel in cause No. 5538, A. Guthrie & Company against the Standard Marine Insurance Company to this effect:

First: That for all purposes touching questions of law and of fact in the above entitled cause—that is the Guthrie cause—the certificate of insurance and the regular F. P. A. English form of cargo

policy, copies of which are referred to in and attached to the amended libel in said cause as Exhibits "A" and "B" respectively, constitute the entire contract of marine insurance alleged in said amended libel; and that, notwithstanding the express reference in said certificate of insurance to an open policy, there never was any open policy issued or intended to be issued touching the insurance effected by said contract of marine insurance.

Second: That said amended libel may be deemed as amended in accordance with the first paragraph of this stipulation.

Third: That no reformation of said contract shall be required or deemed necessary in said cause.

That was a stipulation, if the Court please, entered into in the Chesley case because Your Honor had exceptions to the second amended libel in the Chesley case under advisement and determined those exceptions, but that stipulation was not put into the Guthrie case and we are now putting it in.

(Discussion.)

THE COURT: Where will the Court find this amendment; is it a stipulation?

MR. GORHAM: The amendment is a stipulation entered in the Chesley case, a written stipulation, dated November 26, 1926. The amendment that I have just read is by written stipulation of November 26, 1926, in the Chesley case, and we are

now inserting the same stipulation and amendment in the Guthrie case. Counsel for the Respondent has a further statement to make.

MR. COSGROVE: There is a stipulation in each of these cases, if the Court please, reading as follows:

> "That this cause may be, for the purposes of trial, consolidated with cause No."—that is the number of the other cause—"in this Court, in admiralty"—Now I read from the Chesley stipulation—"wherein A. Guthrie and Co., Inc., is libellant, and Standard Marine Insurance Company, Ltd., a corporation, is respondent.
>
> That Article III of respondent's separate and affirmative defense (set forth in its answer to libellant's second amended libel) may be amended by interlineation, adding after the word 'that' in the seventh line of said article the words 'their brakes were not set and ,'."

THE COURT: What are you reading from?

MR. COSGROVE: A stipulation.

THE COURT: What stipulation is that?

MR. COSGROVE: That is a stipulation of September 15th, I believe.

MR. GORHAM: September 19th.

MR. COSGROVE: 19th.

MR. GORHAM: 1926.

MR. COSGROVE: 1927.

THE COURT: In which case.

MR. GORHAM: That is in the Chesley case, a written stipulation. I do not think that was filed in the other cases at all. No.

MR. COSGROVE: Yes, it was.

MR. GORHAM: Was it?

MR. COSGROVE: There is the same stipulation in the other case, if the Court please. We would like to have the answers amended according to the stipulation.

MR. GORHAM: We further ask, if the Court please—

THE COURT: You are asking that that be inserted as an amendment without filing a new pleading?

MR. GORHAM: Yes, that is satisfactory, if the Court please. We also ask at this time an order publishing the deposition of B. B. Whitney, heretofore taken and filed in these causes, or in one of them, in the office of the clerk, and also a statement in the nature of a deposition by Mr. Summers, the weather bureau man at Seattle, heretofore taken and filed with the clerk of this Court.

THE COURT: Any objection?

MR. COSGROVE: No.

THE COURT: It is so ordered.

MR. GORHAM: Now, if the Court please—

MR. COSGROVE: I think we ought to in-

troduce this stipulation of consolidation or statement of consolidation.

MR. GORHAM: Well, we did.

MR. COSGROVE: No.

MR. GORHAM: No. All right. Yes; that is the stipulation of September 29th, 1927.

THE COURT: A while ago I understood you to say September 19th. Is that another stipulation?

MR. GORHAM: No. It is September 19, 1927. That is the stipulation with reference to consolidation and with reference to the amendment of respondent's separate and affirmative defense. That is 1927. The other stipulation is November 26, 1926, amending the libels in each case.

THE COURT: Then what were you saying regarding a stipulation of September 29th?

MR. GORHAM: There is not any of September 29th, if the Court please.

(Proctors for the respective parties made opening statements.)

MR. GORHAM: Mr. Clark, will you give me the Wrenn deposition. If Your Honor please, we will put in formal proof in the first case, the Guthrie case, and then we will put in formal proof in the Chesley case, and then we will put in proof with reference to the perils of the sea, which will apply to both cases. That will be the order of the proof, if that is satisfactory to the Court.

THE COURT: What time of year was this?

MR. GORHAM: I think it was in February, if the Court please, February 3rd, on the morning of February 3, 1926.

THE CLERK: What deposition did you want?

MR. GORHAM: The Wrenn.

THE CLERK: I will have to go to the office and get it.

MR. GORHAM: I think Mr. Cosgrove will let me read the copy which I have.

MR. COSGROVE: Yes. Go ahead.

MR. GORHAM: This deposition has heretofore been published by an order of the Court. Deposition of V. C. Wrenn, taken in Portland, Oregon, on the 26th day of November, 1927, on notice, and both parties being present.

(Proctors for the respective parties read the said deposition, and proceedings were had thereon, as follows:)

V. C. WRENN, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your residence, Mr. Wrenn?

A. Oak Grove.

Q. Multnomah County, Oregon?

(Testimony of V. C. Wrenn.)

A. Clackamas County, Oregon.

Q. You reside there permanently?

A. Yes, sir.

Q. And outside the District of Washington more than one hundred miles from the place of the trial of this cause at Tacoma?

A. Yes, sir.

Q. What is your occupation, Mr. Wrenn?

A. I am purchasing agent and office manager for A. Guthrie & Company.

Q. They are the libelants in this cause?

A. Yes, sir.

Q. How long have you been such purchasing agent?

A. Purchasing agent since nineteen thirteen, office manager since seventeen.

Q. What is their business?

A. Contractors and engineers.

Q. What scope of contracts?

A. General contracting, engineering work in particular.

Q. Now engaged in driving a tunnel in the Cascade Mountains for the Great Northern Railroad?

A. Yes, sir.

Q. What have been and are your duties as purchasing agent?

(Testimony of V. C. Wrenn.)

A. I buy practically everything that we use in the operations out of the Portland office, and direct other purchases that are made.

Q. How about the disposition of equipment that you have acquired,—that come through your office?

A. That passes through my hands also.

Q. Are you familiar with the Cushman power project in the Olympic Mountains, state of Washington?

A. Yes, sir.

Q. Did your company have anything to do with that project?

A. We had the contract for the building of the dam and the power house building.

Q. Did you use any of your equipment in that work under your contract?

A. Yes.

Q. What was the character of the equipment, generally speaking?

A. The equipment we used in excavation and concrete work.

Q. What was the volume of that work?

A. In dollars, you mean?

Q. No, no; so far as the magnitude of the contract or otherwise was concerned?

A. A hundred thousand yards of concrete,

(Testimony of V. C. Wrenn.)

forty or fifty thousand yards of excavation,—I don't recall just offhand.

Q. And how much concrete?

A. A hundred thousand yards.

Q. Did you have your equipment on that work in the month of January, 1926?

A. We started moving off in January.

Q. And do you remember of that equipment being moved from Potlatch towards Seattle about the first of February?

A. Yes, sir.

Q. You ordered the insurance to be placed upon that equipment?

A. Yes.

Q. You do that personally?

A. Yes.

Q. Through whom?

A. Mr. Chesley.

Q. Chesley of the Chesley Tug & Barge Company?

A. Yes.

Q. That is the policy that is involved in this litigation, this lawsuit?

A. Yes.

Q. Was that equipment which you moved from there on or about the first or second of February

(Testimony of V. C. Wrenn.)

owned by the,—state who was the owner of that equipment.

A. A. Guthrie & Company was the owner.

Q. How long had they been the owner, approximately?

A. Some of it for sometime, and some was new when we went on the job up there.

Q. Had they been the owner for thirty days or more?

A. Oh, yes; none was under six months old.

Q. And as it was moved from the work and on to the barge for shipment to Seattle, it still remained in the ownership of your company?

A. Yes; with one exception,—there was a geared, pump listed here for six hundred and fifty dollars. We paid for it immediately after the scow was lost.

MR. GORHAM: Please mark this 'Wrenn's Deposition identification 1' (Handing paper to reporter).

Said paper was so marked 'Wrenn's Deposition, Identification 1'.

Q. I show you a paper marked 'Wrenn's Deposition Identification 1', and ask you what that is.

A. This top paper?

Q. All of it, all together.

A. List of contents of four cars of equipment.

(Testimony of V. C. Wrenn.)

with the exception of this first car on here, and that is only part of the list.

Q. Equipment of what four cars?

A. Four cars of equipment that were shipped on Chesley's barge on February first or February second, I am not sure which.

Q. And covered by the policy of insurance in question?

A. Covered by the insurance policy in question.

Q. Was that list made in your office?

A. This list was made in my office, yes.

Q. Is that, so far as you know, a true list of the equipment owned by your company and shipped on that barge at that time and covered by the policy?

A. Yes.

Q. With the exception of that—?

A. With the exception of that motor which was not ours at the time of the loss and with the exception of that one car there which was not complete.

Q. You mean on the first page?

A. The first car, Great Northern 62437.

Q. What additional equipment was in that car?

A. Do you want me to read off the list?

Q. No. There was additional equipment?

(Testimony of V. C. Wrenn.)

A. Yes.

Q. What did it consist of?

A. Four dump cars, sixty-seven three-foot sections of drop chutes—

MR. COSGROVE: (Interrupting) This is additional equipment to what?

MR. GORHAM: To this list, that is all.

A. (Continuing) Five concrete carts, one number 8850 Lakewood round hopper, one number twelve Smith tilting mixer, number 10163 with batch discharge hopper, one three-quarter yard Hayward orange peel bucket.

Q. What was the approximate value on February first of the equipment the description of which you have just testified to?

MR. COSGROVE: Objected to as incompetent, irrelevant and immaterial.

MR. GORHAM: You may answer the question.

A. Six hundred dollars.

Q. I will ask you,—the first page of Identification 1 refers to G. N. car 62437; the insurance policy calls for G. N. 62487; is that a clerical error in one place or the other?

A. Clerical error in one place or the other,—same car.

Q. Look at Identification 1, second page. I will ask you, after deducting the value of the geared

(Testimony of V. C. Wrenn.)

motor, or that pump, what would be the approximate value of the equipment of the car, exclusive of that one pump?

A. Four thousand eight hundred and forty-four dollars.

Q. Referring now again to the contents of car 62437, which is partly described on page 1 of Identification 1, I will ask you if the list of additional equipment in car 62437 other than shown on page one of Identification 1, and to which you have testified, was or was not owned by A. Guthrie & Company on February first or second, 1926?

A. Additional equipment was owned by A. Guthrie & Company?

Q. Yes.

A. Yes.

Q. From what record was Identification number 1 made up?

A. Made up from the shipping list as sent in by the field boss.

Q. At the works where this contract was being performed?

A. Yes, where the cars were loaded.

Q. You have that in your possession now?

A. I have it in my hand, yes, sir.

Q. That was mailed to the general office of A. Guthrie & Company, Portland?

(Testimony of V. C. Wrenn.)

A. Yes.

Q. At or about that time?

A. Yes, sir.

Q. Who makes that list up?

A. This list was made up by C. M. Faulkner who was the field accountant.

Q. Of what company?

A. A. Guthrie & Company.

Q. And what were his duties?

A. General cost accounting and looking after disposition of material on the job,—that is, checking it in and out.

MR. GORHAM: We offer Identification 1 in evidence, and we ask to have these papers marked 'Wrenn's Deposition, Identification 2', consisting of sixteen pages.

Said paper marked 'Wrenn's Deposition, Identification 1' was received in evidence and is hereto attached, and said paper consisting of sixteen pages was marked 'Wrenn's Deposition, Identification 2'.

Q. This Identification number 2 is that which you have just identified as returned to you by the field accountant?

A. Yes.

Q. When you are speaking of A. Guthrie & Company, you are referring to A. Guthrie & Co., Incorporated,—that is the technical name?

A. Yes.

(Testimony of V. C. Wrenn.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Libellant in referring to these cars refers to Great Northern numbers 60054, 62487, 61114 and 60152, four Great Northern cars?

A. Yes, that is with the exception of this car here 62487,—it is either 487 or 437; there is a clerical error there some place in that car.

Q. From the testimony you have given I judge that on Great Northern 60152 you claim there was certain equipment on board this car in addition to that set forth in your exhibit,—the additional equipment you state was valued at $650?

A. Yes.

Q. That was not the Libellant's property?

A. No, not at that time, although we paid for it immediately after the loss.

Q. And then did I understand you to say that there was other equipment on board this car, still other equipment not listed in your number 1?

MR. GORHAM: Not on that car but on 62347.

MR. COSGROVE: Car 62437 or 87, as it may be, there was equipment aggregating in value twelve hundred dollars in addition to that listed?

MR. GORHAM: Inclusive of that; this is number 1.

Q. Where were these four-yard Western dump cars?

(Testimony of V. C. Wrenn.)

A. They were on another car.

Q. 61114?

A. Yes, sir.

Q. Well, this testimony that you have given is for the purpose of showing that there was on board these cars the property of Libellant of the value equal to that of the policy?

MR. GORHAM: Otherwise, by Identification, —by exhibit number 1 we show in the one car a value of equipment less than was insured, and we are supplying a list of additional equipment in that particular car which brings it up to and beyond the value insured.

Q. Well, I will ask you another question: Was all the property in these particular cars mentioned as of February 2, 1926, the property of A. Guthrie & Company with the exception of this pump?

A. This pump and motor.

Q. And was it all of the approximate value of the amounts stated in the policy of insurance?

A. In excess of the amount stated in the policy of insurance.

Q. You didn't see these cars that you refer to loaded on this Chesley barge, did you?

MR. GORHAM: We will tie that up later.

MR. COSGROVE: What he said about it being loaded on the cars I would object to as hearsay.

(Testimony of V. C. Wrenn.)

MR. GORHAM: We will tie that up. We are simply showing by this witness who was the owner of the material on those cars, and we will prove what went into the cars with other witnesses. (To witness.) You were the bailee of that, and were using it in your contract work?

THE WITNESS: We had rented it and had been using it.

THE COURT: What is he referring to; that additional equipment?

MR. GORHAM: That pump.

MR. COSGROVE: I assume it was the pump.

(Continuing reading.)

MR. GORHAM: We offer in evidence 'Wrenn's Deposition Identification 2'.

Said papers were received in evidence and are hereto attached.

MR. COSGROVE: I take it that this testimony is not only to show the ownership of the material that was put into these particular cars, but it was in them on February second?

MR. GORHAM: Yes, and that the value was far in excess of the cash value as he has testified in cross examination in response to your questions. There is no question of value between us.

MR. COSGROVE: No.

(Testimony of V. C. Wrenn.)

MR. GORHAM: It is stipulated that the parties waive the reading of the transcript of these stenographic notes by the witness, and waive the witness' signature to the deposition.

MR. COSGROVE: All right."

MR. GORHAM: We offer in evidence the deposition, if it is necessary. We offer in evidence the exhibits attached to the deposition.

THE COURT: Admitted.

THE CLERK: There is a notice and order to publish, but our record does not show that there was any deposition of Mr. Wrenn ever filed.

MR. GORHAM: We have got a copy. Will you admit this is a copy.

MR. COSGROVE: Except I would like to have those exhibits.

MR. GORHAM: Why, yes.

MR. COSGROVE: This without the exhibits is not of value to anybody and I never had a copy of the exhibits.

MR. GORHAM: This is a surprise to me, if the Court please. I can telegraph to the Commissioner at noon asking what he did with that. He may have sent it to Seattle. He knew we were from Seattle and he may have sent it to Seattle. If it is there we can get it.

THE COURT: What are the exhibits?

MR. GORHAM: No. "1" is a typewritten list of this equipment and No. "2" is a list of equipment in the handwriting of the people on the job that was sent to Mr. Wrenn. We have a witness present who was in charge of the job on Lake Cushman, who will identify that list and show that that material went in. The only issue in the pleadings is whether we were owner or not; that is the only issue. They admit everything else but the fact that we were the owner of this equipment.

MR. COSGROVE: Through this deposition I did not admit that this material was loaded into these cars.

MR. GORHAM: Not in the deposition, but you have admitted it in your pleadings. We call Mr. Faulkner. It never occurred to me, if the Court please, having gotten the copy, to inquire whether it was filed. I presumed that it was. And we ask leave to file those exhibits when we ascertain where they are.

C. M. FAULKNER, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. That your full name.

(Testimony of C. M. Faulkner.)

A. C. M. Faulkner.

Q. What is your business, Mr. Faulkner?

A. I am employed by A. Guthrie & Company as clerk and accountant.

Q. Have you a profession?

A. Yes, sir.

Q. What is your profession?

A. Civil engineering.

Q. Are you a graduate of an accredited college?

A. Yes, sir.

Q. How long have you been a civil engineer?

A. Since I graduated in 1906.

Q. And what were your duties as accountant for Guthrie & Company?

A. Well, I had charge of their field office, including the accounting and keeping of pay rolls and disposition of material, all the duties that come within a field office.

Q. That is A. Guthrie & Company, Inc., of Portland, the Libellant in this cause?

A. Yes, sir.

Q. You were at the scene of the construction of the Cushman project—

A. I was.

Q. —in this state, in the interest of Guthrie & Company?

(Testimony of C. M. Faulkner.)

A. Yes, sir.

Q. When did you cease working there; when did Guthrie & Company cease working there approximately?

A. Well, we left there on the 6th of February, 1926.

Q. When did you ship your material out?

A. We shipped—made several shipments beginning in January I think the—I could not give you the exact dates.

Q. Guthrie & Company had their camp equipment there?

A. Yes, sir.

Q. Do you remember of any shipment being made on or about February 1st?

A. Yes, sir.

Q. The last shipment I am referring to now, the last that you sent out.

A. It was about that date. I could not give you the exact—

Q. How many car loads were there?

A. Four.

Q. Did you check that exact stuff?

A. Yes, sir.

Q. And made a list and sent it to Portland?

A. Yes, sir.

(Testimony of C. M. Faulkner.)

Q. That is the list Mr. Wrenn referred to in his deposition as having received?

A. I presume so unquestionably.

Q. You know of that motor pump?

A. Yes, sir.

Q. Now exclusive of the motor pump, do you know what the reasonable value—

MR. GORHAM: Well, I guess the value is admitted $6100. You have admitted the value of the shipment on those four cars.

Q. Would or would not the value of the equipment on those four cars exceed $6100?

A. Well, I would say they would, but I would have to take those items and place a value on each separate item before I could make—

MR. COSGROVE: I think you are limited, Mr. Gorham, to the valuation of each car set forth in the policy rather than to a total valuation.

MR. GORHAM: Well, you have admitted the total value there.

MR. COSGROVE: If the value has anything to do with it at all it is a per car valuation as set forth in the policy.

MR. GORHAM: I am handicapped by the fact that that list is not here.

THE CLERK: I can telephone our Seattle office and see if it is on file there.

(Testimony of C. M. Faulkner.)

MR. GORHAM: I wish you would. In the third paragragh of the amended libel we allege that between the first and third of February, 1926, the Libellant was the owner of certain camp equipment of the aggregate value of $6100 on board certain railroad freight cars as follows, enumerating the certain cars and initials with the amount and the value of equipment on each car. All of that is admitted. If they admit that the aggregate value is $6100 I do not think it is necessary for us to particularly give the value in each particular car at this time. They have admitted the aggregate value and they have simply denied the ownership.

Q. That property that you put into those cars at Lake Cushman was the property of A. Guthrie & Company?

A. So far as I know, it was; yes, sir.

MR. GORHAM: I think that is all just at present.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. What property did you put in those cars, Mr. Faulkner?

A. I could not tell you without the original list to identify it.

Q. Where was it going?

(Testimony of C. M. Faulkner.)

A. It was loaded on the cars to go to Potlatch and to go from there of course to Seattle.

Q. To Seattle only; was that the destination?

A. So far as I know, that is the only destination I knew of.

Q. And when were these loaded?

A. Well, I would need the date of this list to tell you exactly, but it was about the first of February.

Q. How many cars were there?

A. Four cars.

Q. Did you load any other four cars at that time?

A. Not at that particular time; no, sir.

Q. Did you do the loading?

A. I didn't do the loading; no, sir. I checked the material onto the cars.

Q. Do you remember what the material consisted of?

A. There would not be any use for me to attempt to give you any list without the original list; I simply could not do it.

Q. Do you remember a donkey engine?

A. I would rather not answer those questions until the list is furnished me because I might make an assertion that would be wrong.

MR. COSGROVE: I would like to cross ex-

amine the witness again upon the production of the list.

THE COURT: It is so understood.

MR. GORHAM: Yes. Of course we will have to recall the witness when we get the list. I have got a copy of that list somewhere, but it is only a typewritten copy. He might refresh his memroy as to the articles, but it would not identify the original list at all. We offer in evidence the original certificate of insurance issued by the Respondent to A. Guthrie & Company, February 2, 1926, No. 74396, for $6100, of the Standard Marine Insurance Company, Ltd.

MR. COSGROVE: No objection.

THE COURT: The Clerk is not here. It will be admitted. You will see that the Clerk marks it.

MR. GORHAM: Yes.

(Document referred to admitted in evidence and marked Libellants' Exhibit "1".)

MR. GORHAM: Now with the exception of producing the deposition containing those original exhibits of Wrenn, Exhibits "1" and "2", and identifying them by this witness, that is our formal case on the Guthrie cause with the exception of the weather and the loss of the cars and contents.

(Witness excused.)

(Testimony of B. R. Nichols.)

B. R. NICHOLS, called as a witness on behalf of the libellants, being first duly sworn, testified as follows:

THE COURT: Your full name?

A. B. R. Nichols; N-i-c-h-o-l-s.

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Will you state your full name?

A. B. R. Nichols.

Q. What is your business, Mr. Nichols?

A. Purchasing agent, City of Tacoma.

Q. How long have you been such purchasing agent?

A. Six months. Previous to that purchasing agent for the Light Department.

Q. How long were you purchasing agent for the Light Department?

A. Oh, I have been in the employ about seventeen years. I would say about ten years.

Q. What were your duties as purchasing agent for the Light Department?

A. Purchasing supplies and taking care of the rental of equipment and so forth.

Q. Do you remember of the City of Tacoma renting from Sussman & Company of this City a certain locomotive crane on its own wheels in 1925?

A. Yes, somewhere in May.

(Testimony of B. R. Nichols.)

Q. Was that a written or oral agreement?

A. An oral agreement.

Q. Were you to pay for the hire of that; were you to pay for the hire?

A. Three hundred and fifty dollars a month.

MR. COSGROVE: Let me ask if he knows who made it. Did he make the contract?

THE WITNESS: A verbal contract between Mr. Sussman and R. Davidson, Commissioner of Light and Water, and myself.

Q. When was the car delivered to the City of Tacoma under that agreement?

A. A few days after it left Tacoma. It left Tacoma about the 25th.

Q. Of May?

A. Of May.

Q. 1925?

A. 1925.

Q. For what term did the City hire that locomotive crane?

A. It was an indefinite term. We didn't know how long we would use it. Three to nine or ten months; maybe longer.

Q. To be redelivered to owner at the convenience of the City?

A. At Tacoma, yes.

Q. At the convenience of the City?

A. At the convenience of the City.

(Testimony of B. R. Nichols.)

Q. As to time?

A. Yes, as to time.

Q. Was that crane necessary in the completion of what is called the Cushman Power Project of the City of Tacoma?

A. It was, for the installation of electric equipment.

Q. That project was carried on under ordinance No. 8036 of the City of Tacoma?

A. I don't remember just the ordinance.

Q. Who ordered the shipment of the crane from Tacoma up to the works?

A. Frank Sussman. I instructed Frank Sussman & Company to ship it.

Q. By what route?

A. By rail to Seattle and the Chesley Tug & Barge to Potlatch.

Q. And from there up into the mountains?

A. Yes.

Q. Who ordered the return of the shipment, if any one?

A. As I recollect, our camp foreman up there called in on the telephone and said it was ready to move and the Chesley Tug & Barge Company was notified.

Q. They were notified to return that shipment from Potlatch to Seattle?

A. Yes, and I think they were instructed, too,

(Testimony of B. R. Nichols.)

to send an idler car over there to take care of the boom, as I recollect it.

MR. COSGROVE: I understand that is the Lake Cushman construction ordinance.

MR. GORHAM: Well, here is "An ordinance," if the please, "authorizing the Commissioner of Light and Water to proceed with the construction of the first installation of hydro electric power unit Number two of the City of Tacoma; providing for the issuance and sale of negotiable bonds of the City of Tacoma in the sum of $4,000,000.00 to pay the cost thereof; and creating and establishing a special fund for the payment of said bonds and the interest thereon.

MR. COSGROVE: There is no objection.

THE COURT: Ordinance number what?

MR. GORHAM: Number 8036.

Q. And the crane was hired and used by the City of Tacoma in the matter of the construction of the first installation of the hydro electric power unit number two of the City of Tacoma?

A. Yes.

MR. GORHAM: We offer this in evidence.

(Document referred to admitted in evidence and marked Libellants' Exhibit "2".)

MR. GORHAM: He has found the missing documents. That is all.

(Testimony of B. R. Nichols.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. The City of Tacoma through your Light Department rented this crane of Mr. Frank Sussman for this particular work up at Lake Cushman?

A. Yes.

Q. That was the only job that the City rented this crane for, was it?

A. Yes.

Q. And in February, 1926, the City's work requiring this crane at Lake Cushman was ended, was it?

A. It was.

THE COURT: When?

MR. COSGROVE: In February, 1926.

THE COURT: Something was said about 1925 a while ago.

MR. GORHAM: It was shipped up there in 1925, if the Court please. He said it was up there six or eight months.

MR. COSGROVE: This was on its return.

Q. At the time the crane was shipped back from Lake Cushman the City was through with it, was it?

A. Yes.

Q. And the shipping back was for its return to the City of Tacoma for redelivery to Sussman?

A. Yes.

MR. COSGROVE: That is all.

MR. GORHAM: I should have asked Mr. Nichols:

FURTHER DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Under the oral agreement to hire this crane where was the City of Tacoma to redeliver this crane to Sussman?

A. The rental was to start at the time, the day it left Sussman's yard and to continue until the day it got back to Sussman's yard on the tide flats.

Q. And the City of Tacoma was to redeliver it to Sussman at Tacoma?

A. Yes.

THE COURT: What is this; did you say Sussman's yard?

THE WITNESS: Yes; he has a yard at Tacoma on the tide flats.

MR. GORHAM: That is all.

(Witness excused.)

RUSSELL C. PETERSON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Peterson.

(Testimony of Russell C. Peterson.)

A. Russell C. Peterson.

Q. What is your business?

A. City comptroller, City of Tacoma.

Q. How long have you been the City comptroller?

A. August 1, 1927.

Q. How long have you been connected with the City of Tacoma in any capacity?

A. Since the first of August, 1927.

Q. Is your office the custodian or are you the custodian as City comptroller of the records of the publication by the City of Tacoma under ordinance No. 8829 calling for bids for cash for certain certificates of insurance issued by the Standard Marine Insurance Company to the City of Tacoma on the 2nd day of February, 1926, by the Standard Marine Insurance Company, Ltd., certificate No. 74397?

A. I am.

MR. GORHAM: You have formally denied that. Do you want me to put in formal proof with reference—

MR. COSGROVE: No.

MR. GORHAM: —to the publication of this ordinance and the giving of notice under the ordinance?

MR. COSGROVE: No.

MR. GORHAM: Will you admit that the ordinance No. 8829 was published in the manner re-

(Testimony of Russell C. Peterson.)

quired by law and that the notice therein provided to be given was given as provided by the ordinance? It is merely formal, that is all.

MR. COSGROVE: If you will ask the witness.

(Conference between respective proctors.)

Q. Was this policy of insurance, which is evidenced by certificate of insurance No. 74397, sold by the City of Tacoma at public sale to Chesley Tug & Barge Company?

A. It was.

THE COURT: A while ago you said 74396.

MR. GORHAM: 74397, if the Court please. That was my error.

Q. Did the Chesley Company put in a bid?

A. They did.

Q. For how much?

A. Seventy-five hundred dollars.

Q. Was that the highest and best bid?

A. Presumably.

Q. Do you know whether it was or not?

A. I don't know. I know that that was the bid that was accepted.

Q. That was the bid that was accepted, a bid for cash?

A. Cash.

Q. And the purchase made by Chesley and the sale by the City of Tacoma of the insurance certificate under that bid?

(Testimony of Russell C. Peterson.)

A. Yes, sir.

Q. Do you know the—

THE COURT: That was the other policy?

MR. GORHAM: This is the Chesley Tug & Barge Company case, if the Court please. The other policy was the Guthrie policy.

THE COURT: 74396?

MR. GORHAM: Yes. They were consecutive numbers.

Q. Is that the signature of the Mayor and the City Clerk? (Showing.)

A. It is.

MR. GORHAM: We offer in evidence, if the Court please, the certified copy of the ordinance 8829 of the City of Tacoma, and we offer in evidence certificate of insurance No. 74397 for $15,000 by the Standard Marine Insurance Company, Ltd., issued to the Tacoma City Light Department in the sum of $15,000 on the locomotive crane on its own wheels, including idler car B. & O. 253952, together with the indorsements thereon as follows:

> "For value received the City of Tacoma hereby assigns, transfers and sets over unto the Chesley Tug & Barge Company, a Corporation, of Seattle, Washington, all the right, title and interest of the City of Tacoma in and to the within certificate of insurance and of all moneys

(Testimony of Russell C. Peterson.)

due or to become due thereunder. And it is hereby expressly stipulated that the assignee of this certificate of insurance may at its option in its own name or in the name of the City of Tacoma but at its sole and exclusive cost and expense institute and prosecute to final judgment or decree any and all suits and proceedings in any and all courts thereunder against the insurer under said certificate of insurance. This assignment is subject to all the terms and conditions of ordinance No. 8229 of the City of Tacoma, passed June 2, 1926. In witness whereof the City of Tacoma has executed this assignment by its officers thereunto duly authorized this 16th day of June, 1926." Signed "City of Tacoma"—

Q. Who was the Mayor?

A. M. G. Tennant.

MR. GORHAM: (Continuing)—"M. G. Tennant, Mayor. Genevieve Martin, City Clerk. Countersigned this 16th day of June, 1926, Carl G. Coddy, City Comptroller by P. H. Palmer, Deputy."

Q. That is the signature of the Mayor and the City Clerk upon this endorsement—

A. That is right.

Q. —and the signature of the Deputy City Comptroller—

(Testimony of Russell C. Peterson.)

A. That is right.

Q. —at the time of this assignment?

A. Yes.

MR. GORHAM: We offer that in evidence.

THE COURT: Admitted.

MR. COSGROVE: No objection.

THE CLERK: The ordinance is Exhibit "3" and the certificate of insurance Libellants' Exhibit "4'.

(Documents referred to admitted in evidence and marked Libellants' Exhibits "3" and "4".)

Q. This ordinance was published as required by law?

A. It was.

Q. The notice of the proposed sale as set out and required by the ordinance was published as required by the ordinance?

A. It was.

Q. The records of your office so show—

A. They do.

Q. —by the affidavits of the publisher?

A. They do.

Q. Published in a newspaper?

A. In the newspaper.

MR. GORHAM: That is all.

MR. COSGROVE: I believe your pleadings, Mr. Gorham, allege that this was sold to the highest and best bidder.

MR. GORHAM: Yes.

MR. COSGROVE: There is no examination. He said he didn't know whether that was the highest bid or not. Your pleadings so state, I believe.

BY MR. GORHAM:

Q. Were there any other bids?

A. I was not there at the time, and I don't know as to that. The ordinance states that the certificate could not be sold for less than seventy-five hundred dollars, so therefore I presumed it was the highest and best bid.

Q. It was in fact sold to Mr. Chesley and from that you presume that was the highest and best bid?

A. Yes.

MR. GORHAM: Will you admit it was sold to the highest and best bidder?

MR. COSGROVE: Do you want to say it was the highest and best bid?

MR. GORHAM: It was the highest and best bid to my personal knowledge so far as I know at the time the bid was opened. Is that satisfactory?

MR. COSGROVE: Yes.

(Witness excused.)

W. R. CHESLEY, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

(Testimony of W. R. Chesley.)

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name?

A. W. R. Chesley.

Q. Your business?

A. Manager of the Chesley Tug & Barge Company.

Q. And President?

A. President.

Q. How long have you been President of that Company?

A. Since its organization; since 1910 I think.

Q. In the active discharge of your duties all that time?

A. Yes.

Q. And now?

A. Yes.

Q. Was that the Chesley Tug & Barge Company you refer to in this indorsement of certificate of insurance Exhibit "4"?

A. Yes, sir.

Q. You bid in accordance with ordinance No. 8899 of the City of Tacoma and the published notice for that certificate?

A. I did.

Q. You filed a written bid with the City of Tacoma?

A. I think so.

MR. COSGROVE: There is no criticism of the manner or method of bidding or the sale.

Q. You received this certificate of insurance Exhibit "5" under that bid?

A. Yes, sir.

Q. Your Company ever since has been and is now the owner and holder of the certificates of insurance?

A. Yes, sir.

MR. GORHAM: This is Exhibit "4" I mean. That is "4"?

THE CLERK: Yes, sir.

MR. GORHAM: I just said "5" a minute ago. It is "4." That is all.

MR. COSGROVE: That is all.

(Witness excused.)

C. M. FAULKNER, produced as a witness on behalf of the Libellants, being recalled, testified as follows:

DIRECT EXAMINATION.

MR. GORHAM: These papers constitute the original deposition of Mr. Wrenn, if the Court please, that I read to Your Honor with the exception of the exhibits, and I offer the exhibits attached to the deposition of Wrenn as Wrenn's deposition Exhibits "1" and "2," they are referred to.

THE COURT: I have already admitted those.

(Testimony of C. M. Faulkner.)

MR. GORHAM: We did not have them, if the Court please, to offer them.

(Discussion.)

MR. GORHAM: As long as there is no misunderstanding that they have been offered and admitted.

MR. COSGROVE: They went in as your Exhibits "1" and "2" I believe. You have them listed as Exhibits "1" and "2."

THE COURT: That is the way I have them listed simply in my notes.

MR. GORHAM: Then we better change these other numbers, if the Court please.

THE COURT: I think the Clerk really is responsible for the numbering of exhibits. Any memorandum that the Court keeps is simply torn up when the case is over and the clerk's record is the permanent record.

Q. I show you papers marked Exhibit "2" Wrenn's deposition, Exhibit "2" attached to the deposition of V. C. Wrenn, filed in this cause, and ask you what that is—all those papers.

THE COURT: The Clerk's minutes are that Wrenn's Exhibits "1" and "2" were admitted. The Court did not try to give them a number for the purposes of this case.

MR. GORHAM: No. As long as we keep it

(Testimony of C. M. Faulkner.)

straight that is all right. What numbers will you give those, Mr. Clerk?

THE CLERK: I will give them "5" and "6" if they are separate papers.

MR. GORHAM: All right. Yes, they are separate papers, "5" and "6," so we understand it and will not get confused.

THE COURT: The Wrenn deposition Exhibit "1" is marked Exhibit "5" in this case; "2" in the deposition will be marked Exhibit "6" in this case.

(Papers referred to admitted in evidence and marked Libellants' Exhibits "5" and "6.")

A. That is the original list that I made up listing the material loaded on the four cars.

THE COURT: That is number which?

MR. GORHAM: Number "2," if the Court please, Wrenn's "2."

THE CLERK: That will be "6" in this case.

Q. At Lake Cushman?

A. Yes, sir.

Q. The list that you formerly referred to in your testimony in this case?

A. Yes, sir.

Q. Is that a true list of the materials that were checked into those cars by you?

A. To the best of my knowledge and belief, yes, sir.

Q. Have you numbered the cars there?

(Testimony of C. M. Faulkner.)

A. Yes, sir.

Q. Are the numbers of the cars given on the list?

A. Yes, they are.

Q. And the equipment on each paper there went into the car whose number appears on the list itself?

A. Yes, sir.

Q. Several?

A. Yes, sir.

Q. Are these figures in the right hand column your figures?

A. They are not, no, sir.

THE COURT: In the right hand column?

MR. GORHAM: The figures in the right hand column on the Exhibit, if the Court please, are not Mr. Faulkner's figures. We offer that in evidence. It is already in evidence, "6."

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Are these your figures in either right hand column? There are two right hand columns some places. (Showing.)

A. No, neither of those columns are my figures.

THE COURT: When the witness was on the stand a while ago he talked about or mentioned—you questioned him about values. Are you now not

doing so because of any concession you understand to be made regarding values?

MR. GORHAM: We are not attempting to prove any value by this witness, and the figures I referred to in the right hand column and which Mr. Cosgrove referred to in the right hand column are apparently set opposite each item for some purpose which he is not testifying about.

THE COURT: Simply as to ownership?

MR. GORHAM: As to their ownership and as to their being stowed in these cars for transportation to Seattle from Potlatch by the Chesley Tug & Barge Company.

MR. COSGROVE: Then, I understand from you, Mr. Gorham, that all of the figures in this deposition relating apparently to values, the figures in the right hand columns, are not to be considered.

MR. GORHAM: They are not to be considered. We are not attempting to introduce those in evidence by this paper through this witness, and we haven't any other witness.

MR. COSGROVE: With that understanding that no consideration be given to the right hand column figures, we have no objection to the exhibit.

MR. GORHAM: I call Your Honor's attention to the allegations and denials of paragraph three of the libel of Guthrie & Company:

(Testimony of C. M. Faulkner.)

> "That between the 1st and 3rd days of February, 1926, both inclusive, libellant was the sole owner of certain used camp equipment of the aggregate reasonable value of sixty-one hundred dollars then and there on board certain railroad freight cars, as follows: Used camp equipment on G. N. car No. 60,054 of the reasonable value of one thousand dollars; used camp equipment on G. N. car No. 62487 of the reasonable value of twelve hundred dollars; used camp equipment on G. N. car No. 61114 of the reasonable value of nine hundred dollars; used camp equipment on G. N. car No. 60152 of the reasonable value of three thousand dollars; all of which said used camp equipment on said cars aforesaid libellant caused to be delivered to and laden aboard car barge known as car barge Chesley No. 1, then lying at Potlatch, Washington, then and there operated by Chesley Tug & Barge Co., a Corporation, as sole owner thereof, in connection with and in tow of the tug Ketchikan II, operated by Libellant as sole owner thereof, for transportation of said barge in tow of said tug from Potlatch to Seattle, Washington, under and according to a tariff schedule,"

and so forth, all of which is admitted except the allegation of ownership, so that we were advised at

(Testimony of C. M. Faulkner.)

the time of that admission that we would not have to prove the values in each particular car because there was no issue taken, and that is why we are not attempting to prove it at this time, nor do we expect to prove it at this trial by any other witness. I want counsel to understand my position.

MR. COSGROVE: Well, I am not changing my position on any particular pleading, Mr. Gorham.

MR. GORHAM: No, but I wanted counsel to understand it, that is all.

CROSS EXAMINATION.

(Continued.)

BY MR. COSGROVE:

Q. Did you see all this material as listed in this Wrenn deposition Exhibits "1" and "2" loaded on these cars?

A. I saw everything that is on that pencil list of my own; yes, sir.

Q. Did you see a fifty horse power economy boiler and an American twelve inch derrick with twelve foot bull wheel?

A. Yes, sir.

Q. Did you see that loaded on?

A. Yes, sir.

Q. And four one and one-half yard Petelar dump cars, sixty-seven three foot sections drop

(Testimony of C. M. Faulkner.)

chutes, five concrete carts, one Lakewood round hopper; did you see all of those go on?

A. I did; yes, sir.

Q. Did they go on flat cars or gondolas?

A. Some of them were flat cars, but I could not say positively that they all were.

Q. Did you superintend the loading?

A. No, I did not superintend the loading; no, sir.

Q. Who did the loading?

A. Part of it was done by this locomotive crane that is in question and part of it was done by hand and I cannot just tell you who was in charge of that.

Q. Is the man present who loaded that?

A. I think the man who operated the crane is, but the fellow who was in charge of Guthrie's forces there I don't think he is. I can tell you who the superintendent was, but I am not positive that he was present when that loading occurred.

Q. Who was in charge of the fastening of the cargo, this equipment, on the cars?

A. Well, if I could tell you that I could tell you who was in charge, because I just don't know who the man was that—

Q. Do you know whether that boiler was shored or fastened on in any manner?

(Testimony of C. M. Faulkner.)

A. No, sir; I don't know anything about the fastenings at all.

MR. COSGROVE: That is all.

MR. GORHAM: That is with reference to the Guthrie case. Now I will ask Mr. Faulkner some questions with reference to the Chesley case.

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. You are familiar with locomotive cranes?

A. Oh, just in a general way. I am no mechanic.

Q. You are no mechanic. You have had to do with such machines in your profession as a civil engineer?

A. More or less; yes, sir.

Q. There was a locomotive crane on the work at Cushman?

A. Yes, sir.

Q. That was brought out at the same time these last four cars of equipment were?

A. It left to go to Potlatch at the same time.

Q. At the same time?

A. Yes, sir.

Q. What was that locomotive crane? Explain to the Court just generally, I mean.

A. Well, a locomotive crane is a crane that travels on a track and has a hoist and a crane that is capable of lifting large weights.

(Testimony of C. M. Faulkner.)

Q. By a boom?

A. By a boom; yes, sir.

Q. What was done with that boom with reference to position at the time it was sent out to Potlatch?

A. It was loaded on an empty flat car which we call an idler.

Q. A gondola car?

A. I don't know whether it was a gondola or flat.

Q. To whom did that crane belong?

A. Well, our impression was that it was a crane that belonged to Mr. Sussman, rented by the City of Tacoma.

Q. How long had it been on the works at the Lake Cushman power plant?

A. Several months. I could not say just exactly.

Q. How much during that time, was it in operation?

A. Well, it was doing something the greater part of the time.

Q. How close, if any time were you to the crane?

A. Oh, I was right by it and upon it.

Q. What was its general condition, if you know?

(Testimony of C. M. Faulkner.)

A. It was in workable condition; that is about all I could say; it was working practically all the time.

Q. Did you know of its failing to work at any time by reason of any defect or lacking in any parts?

A. Not that I know of; no.

Q. Was it used finally for loading the Guthrie equipment on these cars about the first of February?

A. Yes, we used it then. We used it at various times, loaded out all our heavy equipment with it in fact.

Q. Did you make any particular examination of its boilers or engines or gears?

A. No, sir.

Q. Do you know its age?

A. I do not.

Q. What would be the largest weight that it would lift during the operations at Lake Cushman, if you know; approximately I mean?

A. I could not say. They lifted some large valves and pipe and a lot of stuff. I could not just tell you what the weight in tons was.

MR. GORHAM: That is all, if the Court please.

CROSS EXAMINATION.

BY MR. COSGROVE:

(Testimony of C. M. Faulkner.)

Q. How high was that boiler you just mentioned?

A. The boiler of the locomotive crane?

Q. Yes.

A. How high was it?

Q. Yes.

A. Oh, I could not tell you that. I do not know.

Q. Was it on its own wheels?

A. Yes, sir; the crane was on its own wheels.

Q. No; the donkey boiler?

A. It might have been a donkey boiler.

THE COURT: Are you talking about one thing and the witness talking about another?

MR. COSGROVE: I don't know. We will find out.

Q. I am talking about this boiler I mentioned a while ago.

A. I am talking about the locomotive crane.

Q. Well, let us talk about the boiler.

A. All right.

Q. Was that boiler on its own wheels; was it on wheels?

A. No, sir.

Q. How high was that?

A. Oh, including the smokestack to the top of the smokestack—

(Testimony of C. M. Faulkner.)

Q. To the top of the boiler?

A. To the top of the boiler, oh, I guess that it was seven or eight feet, something like that.

Q. Was that on a platform, a base?

A. Well, it was on a sort of skids, regular skids for a donkey boiler.

Q. And what was this derrick that I just asked you about a moment ago?

A. The derrick, the American derrick?

Q. Yes.

MR. COSGROVE: Where is that list?

Q. (Continuing) With a twelve foot bull—

A. A twelve foot bull wheel?

Q. Bull wheel, yes.

A. Well, that was the iron part of the derrick that we had on our sand and gravel plant.

Q. Was that a perpendicular wheel?

A. No; it was a wheel that was in a horizontal —worked on a horizontal plane.

Q. How high did this American derrick stand above—What was the height of the derrick?

A. Well, I could not say what the height of the derrick was, but the derrick was dismantled when it was loaded on the cars. This was the irons, the derrick irons.

Q. Were there any other high items of this character like the boiler?

(Testimony of C. M. Faulkner.)

A. I would like to look at the list so I can see a little more definitely what was on there please.

(Document handed to the witness.)

A. (Continuing) Well, that No. 12 Smith tilting mixer would probably be six feet high, I would say just offhand.

THE COURT: How long were the skids under the donkey?

THE WITNESS: I could not tell you that just how long they were.

THE COURT: Was it loaded with the skids or did they take it off the skids?

THE WITNESS: Well, my recollection is that it had the skids under it. They are small skids; they are not the big skids like you have under a logging donkey that are three or four feet high, you know. They are small skids. No, there is nothing else there that had any height.

Q. The skids were just for the purpose—

A. Pulling it around from place to place.

Q. Putting the donkey up on the—

A. Well, they use them with the little skids under them. They pull them from place to place with a line on their own power.

Q. What would be the weight of that boiler?

A. I could not tell you that.

(Testimony of C. M. Faulkner.)

Q. And I notice on this second page of Exhibit "2"—

MR. GORHAM: That is Wrenn's "2" you mean?

Q. (Continuing) Wrenn's "2," these particular items: 4 one and a half yard Peteler or Pefeler dump cars.

A. Peteler.

Q. 67 three foot sections drop chutes, 5 concrete carts, 1 No. 8850 Lakewood round hopper, 1 No. 12 Smith tilting mixer, No. 10163 with batch discharge hopper, 1 three quarter yard Hayward orange peel bucket; was that put on one car or more than one car?

A. Let me see the list please.

Q. What is your memory?

A. Well, I would like to look at the list. I made that list up at the time and that is my record.

Q. I was asking you from your memory; not from this list.

A. I don't know from memory.

Q. The list might tell you what the answer was.

A. I cannot remember what went on any of these cars except to look at that list.

MR. GORHAM: I think the witness is entitled to look at the list. It was a memorandum made at the time, if Your Honor please.

(Testimony of C. M. Faulkner.)

A. (Continuing) It was made two years ago and I can't remember it.

THE COURT: It maybe that any answer that he gives would require him to look at the list in order to explain. Just flatly stating that he can't remember without it, if Mr. Cosgrove wants the information and he still persists in his statement that he can't remember about it, why it is up to Mr. Cosgrove to show him the list if he wants the information.

MR. GORHAM: If Mr. Cosgrove wants it?

THE COURT: Yes.

MR. COSGROVE: I am getting along all right. I do not need any help.

THE COURT: If there is any answer that requires explanation or you think requires explanation it is time enough for the Court to rule on the request that he see the list.

MR. GORHAM: He has already testified, if the Court please, that the particular material on each sheet went into the car whose number is designated on that particular sheet; he has already testiged to that.

MR. COSGROVE: Well, that is all right. I am going to show it to him. (Handing paper to the witness.)

THE WITNESS: Yes, sir.

(Testimony of C. M. Faulkner.)

Q. I asked you if all those items were in one car?

A. Yes, sir.

Q. Were there any other items in that same car?

A. Yes, sir; the items on page 1 were also on the same car.

Q. How were they stacked up on the car; do you recollect?

A. No, sir; I do not.

Q. Well, did it make a high pile or a full load, or a small load?

A. Yes, it was a full load. It did not impress me as any tremendous load or particularly high; there was nothing about the load that made any particular impression on me any more than any other car.

Q. It filled the car pretty well full?

A. Yes, pretty well full.

Q. And on account of the different shapes of these items did not the contents of the car stand up in the air above the deck of the car considerably?

A. Well, that would depend upon what considerably was. It impressed me as just an ordinary car of contractor's equipment, that would be the impression I got from it.

THE COURT: What do you mean by deck of

the car? The Court can't think of anything to a flatcar but the floor of the car as being the deck, and of course it would be above the floor of the car. What do you mean by the deck?

MR. COSGROVE: It is the floor.

Q. How high above the floor did these contents extend?

A. That would be merely a guess. I didn't measure them, but I would say between six and eight feet no doubt.

Q. You personally checked all these items onto these cars?

A. Yes, sir.

MR. COSGROVE: That is all.

MR. GORHAM: That is all, Mr. Faulkner.

(Witness excused.)

ALBERT E. HARRINGTON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Harrington.

A. Albert E. Harrington.

MR. COSGROVE: Pardon me. Is this in the Chesley?

MR. GORHAM: Yes, this is in the Chesley.

Q. What is your age, Mr. Harrington?

(Testimony of Albert E. Harrington.)

A. Forty-four years.

Q. What is your business?

A. An engineer.

Q. What kind of an engineer?

A. A steam operating engineer.

Q. How long have you been a steam engineer?

A. About twenty years.

Q. What character of steam engineer?

A. Principally an operator, shovel man, crane man, and so forth, derrick operator.

Q. Are you engaged in that business now?

A. I am.

Q. Are you familiar with machinery, engines and parts?

A. Yes, sir.

Q. Were you at the Lake Cushman power project of the City of Tacoma at Lake Cushman in 1925 and '26?

A. Yes, sir.

Q. For whom were you working there?

A. The City of Tacoma.

Q. In what capacity?

A. Operator of a locomotive crane.

Q. How many locomotive cranes did they have there?

A. Just the one.

Q. When were you first employed by the City with reference to this particular project?

(Testimony of Albert E. Harrington.)

A. About the first of June, 1925.

Q. And in what capacity were you employed?

A. As an engineer and operator.

Q. And what were to be your duties on the work?

A. To operate this locomotive crane and care for it.

Q. This locomotive crane?

A. Yes, sir.

Q. Did you go up with the crane from Tacoma or did you first take charge of the crane at the works?

A. I first took it at the works. The crane was there when I took it.

Q. What was the condition of the crane at the time you first saw it at the works?

A. It was mechanically in good condition.

Q. How soon after you went there did you commence to operate it?

A. I believe the next day to the best of my recollection.

Q. Were you the chief man in charge of the operation of that crane on that work?

A. The only man in charge of it.

Q. And for how long did you operate that crane after you arrived at Cushman, approximately?

A. About seven months, I believe.

(Testimony of Albert E. Harrington.)

Q. And how continuously did you operate it?

A. Every day except holidays and Sundays; I worked a few Sundays, but nearly every holiday I was off.

THE COURT: You mean by that there were some Sundays you operated?

THE WITNESS: Yes, and some over time at nights.

Q. Explain to the Court just what that locomotive crane on its own wheels was and what its function was; just explain first the machine.

A. Well, the machine itself is a truck with a derrick practically on top of it, one that turns around; it is on an eight wheel truck and it has engines and boilers and gear to turn itself around and operate two fall lines on a locomotive crane and the boom also raises and lowers.

Q. And swings?

A. And swings, turns clear around in any direction. The boom raises and lowers and has two fall lines in addition to the raising and lowering of the booms.

Q. The fall lines run through a rope block and tackle?

A. Over a pulley on the end of the boom to drums; a double drum donkey.

Q. What size wire did it use in its fall?

(Testimony of Albert E. Harrington.)

A. Its fall lines were five eighths.

Q. What was the condition when you first saw it of its boilers?

A. Good.

Q. State whether or not you made any survey of it to ascertain whether it leaked?

A. Yes, sir, I washed the boiler at least seven or eight times while up there and cleaned the flues probably twice or three times.

Q. What?

A. I cleaned the flues nearly every week and the boiler was washed every month or six weeks.

Q. State whether or not you found any leaky condition of the boiler during any of that time?

A. No, the boiler didn't leak at all at any time; no leak in the boiler.

Q. State whether or not the tubes had to be renewed during that time?

A. No, sir; there was no repair on the boiler at all.

Q. State what the condition of the engines was when you first saw it?

A. The engine was in good condition, good mechanical condition.

Q. State whether that condition was maintained throughout the use of it by you at the works up to February, 1926?

(Testimony of Albert E. Harrington.)

A. It was.

Q. State whether or not you had to replace any parts?

A. I believe I replaced one journal on the—that is on the gear, one journal was cutting a little, and I replaced the lines, both the fall and the boom lines, in mid-summer. We didn't break any, but they were old and I replaced them. We had heavy machinery there to handle.

Q. How as to the gear?

A. The gear was good; but little wore at all.

Q. How as to the brakes, the brakes on the gear in the operation of it?

A. On the crane I put one new brake band during the summer on the fall—on the drum that we used on the fall line mostly, renewed that brake lining; not the brake itself, but just the lining. That was in good condition after renewed.

Q. Does the term "locomotive crane" indicate that the machine can move by its own power on a track?

A. Yes, sir.

Q. How many wheels were under this crane?

A. Eight.

Q. Was it ever set on a grade?

A. Sir?

Q. Was it ever set on a grade?

(Testimony of Albert E. Harrington.)

A. It was set on a grade all the time up there.

Q. And what device was used to keep it from moving on the grade?

A. The brake.

Q. The brake on the locomotive crane itself?

A. On the trucks.

Q. How were those brakes set?

A. With steam; steam jammed.

Q. From the boiler on the locomotive crane?

A. Right from the operator's stand there.

Q. On how heavy a grade did you set that crane?

A. I don't know exactly what the grades were there. I would have to find out. We worked on the steepest grade going down to the power house, which I was told was a six per cent grade, but I don't know that it was, but we worked on any grade they had there.

Q. And the brakes would hold?

A. The brakes would hold.

THE COURT: You said six per cent?

THE WITNESS: I was told it was six per cent.

Q. What was the condition of that crane in all respects when it left the works for Potlatch as compared with the condition when you first saw it?

A. It was just as well anyway.

(Testimony of Albert E. Harrington.)

Q. Was it in just as good condition?

A. Just as good condition anyway.

Q. In your opinion did the use that you gave it during that six or eight months impair its condition?

A. No, sir.

Q. Do you know the age of the crane?

A. Not certain, no, I don't. I believe it was stamped on the crane, but I would not be certain.

Q. When the crane came off the works state whether or not it was used in loading the Guthrie camp equipment onto the railroad cars to be dispatched out?

A. All the heavy material was put on with the crane.

Q. When it came out it was attached to the train, hauled by a locomotive of the Phoenix Railroad Company—

A. The Phoenix—

Q. —as a part of the train; was it part of a train composed of other cars when it came out?

A. Yes, sir; they were all coupled together.

Q. What disposition was made of the boom when this crane was set in this train of cars?

A. The boom was lowered over an idler car, a gondola, and the ends taken out of the gondola so that the boom would go down below the sides of the

(Testimony of Albert E. Harrington.)

gondola car within abut eighteen inches of the floor, and it was simply used as an idler; the boom did not lay on the idler, but over it; it was lowered within about eighteen inches of the floor of the gondola car.

Q. And how far in the gondola car did the boom extend?

A. Nearly the length of it.

Q. Do you remember the length of that gondola car, approximately?

A. It had to be a special car because the boom was fifty feet long and it would not go into a forty-foot car, I remember that, but just how close it came to the length of this car or the length of this car, I was under the impression it was a fifty-foot car, but I am not certain; it might go into a forty-five, because your boom extends back a little over the truck of your crane and you would have the drawheads, but the exact length of that car I am not certain.

Q. If this locomotive crane was set into this train and the boom swung over this gondola car, what would keep, if anything, the boom from rising and falling vertically?

A. The laws of gravity. That boom is heavy.

Q. Was it locked in any way?

A. No; it hung in its lines and kept it from rising and falling.

(Testimony of Albert E. Harrington.)

Q. What would keep the boom from swinging from side to side?

A. There was turn-buckles put on each corner of the crane and before letting steam down on the crane I took strain on this boom and the part of the crane that extends back over the circle iron there was timber put under, about probably six by eight; anyhow it just would not go under until you took the strain and lifted up the overhang of the crane and layed that timber on there, and the friction would bind and take all of the teeter out of the body of the crane?

Q. But the swinging sideways?

A. That would also tend to hold it from swinging sideways, because there would be considerable friction on it—weight.

Q. Where were the turn-buckles?

A. The turn-buckles were put on each corner.

Q. State whether or not it was possible for that crane to swing one way or the other.

A. It could not swing at all, and the boom was below the sides of the gondola car in such a way that it could not get out anyway without taking the car sides off.

Q. Was the idler car made fast to the locomotive crane?

A. Yes, sir, it was coupled with standard

(Testimony of Albert E. Harrington.)

couplings and chained with railroad chains in case the couplings should come off.

Q. Furnished by the railway with the car?

A. Sent in by the railroad company with the car such as used in case of broken drawheads and such as that.

Q. Do you know of your own knowledge that it was so chained before it started from Potlatch?

A. Yes, sir; I chained it myself.

Q. What was the size of the chains?

A. I could not say positively, but I think three-quarters or seven-eighths; it was heavy chain; it was the regulation chain such as the railroad company used; whether it would be seven-eighths or three-quarters I could not be certain.

Q. What was the size of the couplings?

A. Standard couplings.

Q. And the pin—

THE COURT: What is that?

THE WITNESS: Standard.

Q. That is, you mean standard for that size cars?

A. Standard, yes, standard railroad couplings.

MR. GORHAM: That is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. This chain you speak of, Mr. Harrington,

(Testimony of Albert E. Harrington.)
was a chain for the making of the connection between the gondola and the crane?

A. Yes, sir.

Q. And I didn't understand what you said about these turn-buckles. Tell me again where these turn-buckles were fastened.

A. The turn-buckles were fastened between the corners of the crane body. There is the turret of the crane body, the part that turns around, and the top of the frame of the crane. The frame, the top, is angle iron which projects and clamps. You can just slip a clamp over it and fasten and clamp over the top of the corner of the turret and then tighten these up. These have a thread and nuts on them so you can pull them up so there is no slack, straighten the crane around and put those on and tighten them, then they can't turn around. They are used for shipping shovels, cranes and all that kind of equipment.

Q. It was not a turn-buckle that was fastened to the deck of the barge or any part of the barge, was it?

A. Within the crane itself.

MR. COSGROVE: Will you mark this (handing picture to the clerk)?

MR. GORHAM: That will be Respondent's Exhibit "A-1"?

(Testimony of Albert E. Harrington.)

(Picture referred to marked Respondent's Exhibit "A-1" for identification.)

Q. Would you mind taking a look at Respondent's Exhibit "A-1" and see if that is a faithful or fair representation of this crane that you have been talking about?

A. It looks very similar.

MR. GORHAM: What did he say?

MR. COSGROVE: He said it is very similar. I took it out of a catalogue just for illustrative purposes, just for the purpose of examining the witness. I offer this evidence (handing picture to Mr. Gorham).

MR. GORHAM: Did this crane at Lake Cushman have a housing around it?

THE WITNESS: Yes, sir.

MR. GORHAM: Not shown by this picture?

THE WITNESS: The house is not on that picture. I said very similar. This picture is open and the crane at Lake Cushman was closed in.

MR. GORHAM: We have no objection.

THE COURT: It will be admitted and the hearing will be resumed at 2 o'clock.

(Picture referred to admitted in evidence and marked Respondent's Exhibit "A-1".)

Further proceedings were continued to 2 o'clock P. M., same day.

(Testimony of Albert E. Harrington.)

December 27, 1927, 2 o'clock P. M.

All present;

Proceedings resumed as follows:

ALBERT E. HARRINGTON, a witness on behalf of Libellants, resumed the stand.

CROSS EXAMINATION (Resumed).

BY MR. COSGROVE:

Q. Did you prepare this crane for transportation from Lake Cushman down to Potlatch?

A. I did.

Q. Did you go with it down to Potlatch?

A. I did. not.

Q. Referring now to Respondent's Exhibit "A-1", which, as I understand you to say, is a representation of this crane with the exception of the housing—

A. Very similar outside of the housing.

Q. —the crane that you had having a housing and this having only a partial housing—

A. That is the main difference.

Q. —you said, I believe, that you fastened the boom to the deck of the crane by means of some chains or bolts.

A. I fastened the crane so it would not turn around by means of turn-buckles to the frame.

Q. Would you take the picture and take this red pencil and mark on that the place where one

(Testimony of Albert E. Harrington.)

turn-buckle was fastened and then mark the place where the other end was fastened?

A. The turn-buckle, one end of the turn-buckle was fast to, I believe there is a hand hold right in the end here—

MR. GORHAM: Mark an "X" there.

A (Continuing)—right in there in the frame and a clamp that comes to this frame for the other end.

Q. Suppose I make an "X", is that the point of the fastening of one turn-buckle?

A. Yes, sir, the one end of one turn-buckle.

Q. One end of it. Now let us mark an "O" for the fastening of the other end of the turn-buckle.

A. Right on the flange that I put the "O" around. You see this flange sticks out somewheres two and a half or three inches, a steel flange.

Q. That flange is the upper part of the deck?

A. That is a channel; you see that is about an eighteen inch channel there with a flange out on both the top and the bottom. You can see by the picture.

Q. Now what was the size of your turn-buckle?

A. I am not absolutely certain, but I think the threads on the turn-buckle were an inch and an

(Testimony of Albert E. Harrington.)

eighth. That is only from my memory, you see; I could not be certain.

Q. Was that the full diameter of the connection?

A. That is the tie, yes. It is threaded. I think it is an inch and an eighth. And the pieces were heavier where you hook on at the end, the hooks were heavier than that, but the threads were an inch and an eighth. That is just from memory; I would not be certain.

Q. Is that the diameter of the bolt—

A. It is threaded.

Q. —which ran all the way from one point of fastening to the other?

A. No; that would be—

Q. What was your smallest diameter?

A. That is it; that is the threaded part of the turn-buckle would be your smallest part.

Q. And you had one on each side?

A. I had two on each side. There was one on the front of the crane and one on the back. You have marked the one and opposite that across from the boom would be another and then another on each end of the back; there was four turn-buckles on.

Q. Were those on the opposite end of the crane fastened to the edge of the decking as in front?

A. I believe they were; I believe they were fastened right to the corner of your decking right here

(Testimony of Albert E. Harrington.)

and to this corner here. This iron is a little different arrangement than there was on the one I had up there. You see this channel that runs through, I don't think that decking came down below that. That channel was omitted and the turn-buckle fastened into the main channel and to this on the deck end. That piece of iron extends down further I am certain, than it did on the crane that was at Cushman.

Q. Did the boom rest on anything in the gondola car?

A. No, sir. It was about eighteen inches from the bottom or the deck of the car.

Q. Do you know what the weight of that boom is or was?

A. I do not.

Q. The brake for holding that crane was a brake which was operated by steam?

A. Yes, sir.

Q. It did not have any other brakes on the car—on the crane?

A. There was a small hand brake on the car—a ratchet hand brake on the trucks.

Q. There was a hand brake?

A. Yes, sir.

Q. Was there any other brake?

A. On the trucks; no, sir.

(Testimony of Albert E. Harrington.)

Q. Was it possible to put the crane in gear, gearing the wheels so that it could not move?

A. It was possible, but improbable. The gear was taken out and loaded inside the cab for shipment. In order to ship in a train, you see those cranes only run about six or seven miles an hour and you take out the gear underneath that gears the engine to the wheels, it slips right off the shaft.

Q. That is held on by a pin, isn't it?

A. Yes, sir.

Q. Take the pin out and slip it off?

A. Take it out and put it up in the cab for shipment.

Q. It could have been just as easily put back on, couldn't it?

A. It could have been.

Q. And when that crane arrived on the barge that gear that was put in the housing could have been taken out and slipped on again, could it not?

MR. GORHAM: Just a minute. We object, if the Court please, as not proper cross examination.

THE COURT: Objection overruled.

MR. GORHAM: That is the Respondent's case, if the Court please.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception.

THE COURT: Allowed.

(Testimony of Albert E. Harrington.)

A. The wheel could have been put back on. It is not a very big job. It would take some time.

Q. It could have all been done with a hammer, could it not?

A. I think not. There is a key and a clamp goes outside the key to prevent the key from coming out and those clamps would have to be put back.

Q. If that crane has been put in gear would the crane have been effectually locked—

MR. GORHAM: Just a minute. The same objection, if the Court please.

Q. —or braked?

THE COURT: As I understand it, the gear would have to be put in before it was put in gear. I sustain the objection.

Q. Was there anything in the gondola car?

A. The block.

Q. Beg pardon-

A. The block. There is a single block that the line runs over, your fall line, past the end of your boom down around your block. That block was in the gondola car.

THE COURT: Read that answer.

(Answer read.)

THE COURT: Was it hanging down or what?

THE WITNESS: No; it was taken off and laid in the gondola car free.

(Testimony of Albert E. Harrington.)

Q. Do you know the weight of this crane?

A. I do not.

Q. What is the height of the crane from the top of the smokestack to the top of the deck?

A. I don't know exactly.

Q. I mean the crane's neck.

A. I don't know exactly.

Q. Well, approximately.

A. Between seven and eight feet.

Q. Are the wheels of this crane the standard railroad wheels?

A. I believe they are.

Q. On top of this crane deck and lying parallel with it appears a notched wheel?

A. Yes, sir.

Q. What do you call that wheel?

A. That is your swinging gear—

MR. GORHAM: What do you call it?

A. —what turns you around. Swinging gear what turns the crane around. You have a small pinion coming right down from the engine inside here that runs in these gears, meshes around and turns her, runs the crane around.

Q. That runs around on what, a pinion or—

A. A pinion runs around it. This part of the gear is stationary and the pinion is fast to the swinging part of your crane and as you turn the pinion

(Testimony of Albert E. Harrington.)

with the engine it turns the top of your crane right around, it causes you to swing around.

Q. Take all of this crane above the swinging gear or that large notched gear that lies on the crane deck, take all of that superstructure and what does it revolve around, a king-pin?

A. A king-pin in the center, right in the center, comes right straight through to your driving gears that you see below.

Q. Between the two trucks?

A. Yes, it is right down through there.

Q. I think you said that you used some sticks or timbers to steady some part of that crane. Where did you have them?

A. Put them right across your truck under the boiler and the swinging part, right across the truck this way. I think it was a six by eight. Anyhow it was just a little more than you can poke in here. By taking a little strain on your boom you would cause this to raise up enough so you could fit it in; you have a tight fit so you have got no rock in your crane.

Q. Let me ask that question again so as to get this straight. On the end of the crane opposite the boom, as I understand you, and on top of the crane deck you laid a timber—

A. Yes, sir.

(Testimony of Albert E. Harrington.)

Q. —between the decking and the revolving portion of the crane?

A. Yes, sir.

Q. What kind of timbers were those?

A. It was about a six by eight; I don't know. It was a flat sawed timber and a little shorter than the crane is wide, probably four feet long.

Q. How was that fastened in?

A. Just laid there. The weight of the crane pinched down on it. I laid that in while I still had steam on the crane so that I could raise this portion up whatever slack there is in your pins there; there would be a small amount.

Q. Now coming to the decking or platform of this crane, what is that decking made of?

A. That particular crane—I don't know what is in this one, but on that particular crane it is steel punchings and concrete poured into it from here up to the deck; the depth of this channel was steel punchings and concrete poured on it. That is for weight, for ballast, that is why they fill them.

Q. Where was it you said you put that gear that was removed?

A. About where this man stands up on the platform inside the house.

Q. Referring to the picture now, Exhibit "A-11", you put it up in—

(Testimony of Albert E. Harrington.)

A. On this platform here.

Q. Up where—

A. Where the man stands.

Q. Where the man stands in the picture?

A. Yes.

THE COURT: What?

MR. COSGROVE: He said the gear which came off.

THE WITNESS: The gear which came off. Here is the picture right here on the shaft. You take that gear out for shipment.

MR. GORHAM: That is below the deck?

A. Yes, below the deck. You go down underneath the deck and take that gear off that gears your two sets of wheels together, take that off and put it inside for shipment.

Q. Did you have anything to do with the loading of this crane on the car or barge?

MR. GORHAM: Objected to as not proper cross examination. That is a part of the Respondent's case under its affirmative defenses.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception, if the Court please.

THE COURT: Allowed.

THE WITNESS: Ask your question again, please.

(Testimony of Albert E. Harrington.)

(Question read.)

A. I did not.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Harrington, you spoke about a hand brake. What was the nature of that hand brake on this crane?

A. Well, the hand brake was a rod going through the frame on the end with a little ratchet wheel and a dog on top so that whatever you pulled up you could lock and the rod on top was square and there was a lever about probably eighteen inches long that you put on there and just tightened that up.

Q. What was the condition of it?

A. The rod that went down through below the clamp was gone off of the bottom of it so that all the strain you had on that rod was the strength of the rod; there was no stay on the bottom; a chain wrapped around that rod, a small chain, and it would hold the crane on a small grade, but it was not a very strong brake.

MR. GORHAM: That is all.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. It did have some strength, did it?

A. Oh, it would hold the crane on a grade if it were already standing somewhere, just leave it that way.

Q. What do you call a small grade?

A. A two or three per cent grade, a small railroad grade. It would hold it there at the storage tracks anyway. That is the way I used to leave it there all the time.

Q. You say there was a piece missing?

A. Well, yes, in a way. The stay on the bottom of this rod was gone.

Q. Well, the absence of that stay weakened the brake?

A. Some.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

RALPH S. DRURY, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Mr. Drury?

A. Ralph S. Drury.

(Testimony of Ralph S. Drury.)

Q. What is your business?

A. I am resident engineer and sales engineer for the Link-Belt Company.

Q. What is the Link-Belt Company?

A. The Link-Belt Company is a corporation doing business in the manufacturing of conveyor machinery, cranes, hoists, and so forth.

Q. And where is your office?

A. My office is in Seattle.

Q. How long have you had that position with that company?

A. Well, the present position about fifteen years.

Q. Are you familiar with the Link-Belt cranes?

A. Yes, sir.

Q. Referring to Respondent's Exhibit "A-1", is that a fair representation of a Link-Belt crane?

A. It is, sir, yes, sir.

Q. The cranes turned out by your company are numbered?

A. Yes, sir.

Q. Does your company have a price list for those cranes new first hand?

A. Yes, sir.

Q. Can you tell me the list price of Link-Belt crane No. 672?

(Testimony of Ralph S. Drury.)

A. The present price list, do you mean?

Q. No; the list price first hand?

A. On the crane similar to 672 the price list—

MR. COSGROVE: Just a moment.

MR. GORHAM: I am going to put the time in there.

Q. (Continuing), At Seattle in February, 1926?

MR. COSGROVE: Is this a new crane?

MR. GORHAM: Yes, a first hand crane.

MR. COSGROVE: That is objected to as incompetent, irrelevant and immaterial. We are dealing with a second hand crane and if value has anything to do with this matter it is the value of a second hand crane.

THE COURT: I understand that. Objection

MR. GORHAM: You may answer the question.

A. The price of a new crane of this type would be $11,680 at Chicago.

overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed:

Q. What would be the cost of transporting it to Seattle approximately?

A. I will have to refer to a record here. (Witness referring to a card taken from his pocket.)

(Testimony of Ralph S. Drury.)
The freight rate within the last two years, unless it has been changed, is approximately $1,080.

Q. That would be added to the Chicago price of the crane laid down in Seattle?

A. Yes, sir.

Q. And what, if anything, would have to be added to the crane upon its arrival in Seattle to put it in commission?

A. The crane would have to be ballasted.

THE COURT: What was that amount; ten hundred and what?

A. Approximately $1,080. The crane would have to be ballasted with, recommended by our company, with steel punchings and then after the steel punchings were added, cemented over the top, grouted rather it is called, with concrete to hold these punchings in place.

THE COURT: P-u-n-c-h-i-n-g-s?

THE WITNESS: Yes, sir.

Q. What would be the approximate cost of that material and labor?

A. Well, the aproximate cost would be approximately $240.

Q. What was the age of this crane I am referring to, 672 I think was the number?

A. The record shows this crane was sold in 1918.

(Testimony of Ralph S. Drury.)

Q. You heard the testimony of Mr. Faulkner and Mr. Harrington in the courtroom this morning—

A. Yes, sir,

Q. —as to the condition of this crane at Lake Cushman?

A. Yes, sir.

Q. From that testimony as to its condition and as to its use during that time can you form an opinion as to the reasonable market value of that crane at Seattle on February 2, 1926, second hand?

A. Well, I would hardly want to say, it depends so much upon the use of the crane absolutely as to what condition it was in; that is, one crane might be used very hard and another one not near so hard, and they would have a different value to a certain extent like any machine, although a crane is a little different from other machines, that is, the market value is not exactly determined all by its use. The value of the crane is perhaps second-hand value —as I say, we are only in the first-hand value cranes; we are not in the second-hand business—the value I would say can only be based upon the life probability of the crane, which might be all the way from we would say fifteen to twenty years; it is pretty hard to say; it depends upon how hard it was used. In selling cranes I might say that

(Testimony of Ralph S. Drury.)
buyers generally depreciate them on from fifteen to twenty years, depending upon their service. I did not see this crane since about two years after it was sold, so I don't know exactly the condition it was in at the time it was supposed to be lost.

Q. Well, from the testimony of Mr. Harrington and Mr. Faulkner as to the condition of the crane on the work, its boilers and engines and gear, could you form any opinion as to the value on February 2, 1926, in Seattle?

A. Well, in talking with owners of various cranes I would say that there is a possibility that the value of this crane would be on a basis of its cost depreciated probably yearly at five per cent.

Q. And if it was eight years—it was 1918 you say it was built?

A. Yes, sir.

Q. 1926 would be eight years?

A. Yes, sir.

Q. That would be forty per cent of its original value?

A. As I say, that is more or less relative, because it depends on the condition it was kept.

Q. If it was kept in good condition and it was in good order and condition at the time, that would be the reasonable market value at Seattle at that time, would it?

(Testimony of Ralph S. Drury.)

A. Yes, sir, it would be somewhere in the neighborhood of that.

Q. Yes, approximately.

A. Approximately.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. As I take your figures your new crane was $11,680 and the freight was a thousand and eighty and your ballasting was two hundred and forty?

A. Yes, sir.

Q. Making a total of about $13,100?

MR. GORHAM: What?

MR. COSGROVE: $13,100.

MR. GORHAM: Yes.

Q. (Continuing) So the depreciation of forty per cent would be approximately $7,860; is that right?

A. I presume that is the figures. It sounds in round figures about right. I have not figured it out on that basis.

THE COURT: Seven thousand eight hundred and what?

MR. COSGROVE: And sixty dollars.

MR. GORHAM: That would be sixty per cent.

MR. COSGROVE: Yes.

MR. GORHAM: Yes, at sixty per cent.

(Testimony of Ralph S. Drury.)

Q. Mr. Drury, what is the weight of the boom on this crane?

A. Between 6500 and 7000 pounds; that is without any hook block on it; just the boom proper; in the neighborhood of that.

Q. What was the length of this crane on the car?

A. As I remember, the truck length itself approximately twenty-eight feet.

Q. Twenty-seven feet to be exact, wasn't it?

A. It possibly is. I don't remember. Somewhere around twenty-eight feet in round figures.

Q. Could you tell if you looked at the Link-Belt locomotive catalogue?

A. Yes, sir, it is given in the back of the catalogue.

Q. I hand you this document and ask you what it is?

A. That is the sales catalogue of the Link-Belt Company.

MR. COSGROVE: Will you mark it for identification?

(Catalogue marked Respondent's Exhibit "A-2" for identification.)

Q. Will you please refresh your memory from this catalogue and see if you can determine the length of that crane?

(Testimony of Ralph S. Drury.)

A. The length of the crane over all, over the bumpers, or couplers, is twenty-seven feet no inches.

Q. You personally knew this crane, did you?

A. Yes, sir, I have seen it.

MR. COSGROVE: That is all.

(Conference between respective proctors.)

MR. GORHAM: I think we will admit, if the Court please, the figures as to the length of the crane so that the book may not have to go in as an exhibit. We do not want to lumber up the record.

THE COURT: Do I understand the exhibit is withdrawn?

MR. GORHAM: Well, he has not offered it. He simply had it marked for identification. But we will admit what he proved by that exhibit, that the crane was twenty-seven feet and no inches.

MR. COSGROVE: Yes.

MR. GORHAM: That is all I want with Mr. Drury, but I understand the respondent wants him.

MR. COSGROVE: If I may take him out of order and ask him two or three questions, in order that he may go, now as my own witness.

RALPH S. DRURY, called as a witness on behalf of the Respondent, having been previously duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COSGROVE:

(Testimony of Ralph S. Drury.)

Q. Mr. Drury, what brakes did this crane have?

A. The way the crane was originally sold, unless it was modified, it had a steam brake on one truck or four wheels.

Q. And when that truck with that crane would be in transportation that steam brake would be out of gear, would it not?

A. Yes, sir.

Q. And you heard the witness preceding you testify as to the removal of that gear at the time this crane was to be put in the train at Lake Csuhman to be transported to Potlatch?

A. Yes, sir.

Q. Would there have been any difficulty in putting that gear back in position and putting the crane in gear?

A. No, sir; it would just take a little time.

Q. Well, how long would it take?

A. Well, I never changed one of them, but I should estimate, from my knowledge of machinery, it probably could be done in from thirty to forty-five minutes.

Q. If that had been done would the crane have been effectually braked?

THE COURT: Been what?

MR. COSGROVE: Effectually braked?

A. Well, in answering that I would have to

(Testimony of Ralph S. Drury.)

explain a little the construction of the crane. If the gears were meshed—

THE COURT: In his question he put in "in gear." Didn't you?

MR. COSGROVE: Yes.

A. (Continuing) The gears being in mesh, the lower trucks could be locked to some extent through operating the lever in the cab by the operator, but this would not be a complete brake; in other words, the crane might move some with that in gear, but it would depend upon the condition of the frictions which are driven by the steam engine through gearing to the trucks.

Q. Do I understand you that that could not have been locked except through the use of steam?

A. No. That could be locked partially by means of the hand lever by the operator.

Q. That hand lever was in the cab?

A. Yes, sir. But that would not be a complete brake.

Q. Assuming that the thermoid linings were in good order and condition, what value would the brake be?

A. Well, it would hold the crane on a fairly level track. It would not hold it probably on a steep grade, because it might overrun the engine;

(Testimony of Ralph S. Drury.)

but probably on, say, a one or two per cent grade it might hold it.

Q. How would the crane be braked, say, if it was on construction some place and on a grade, how would it be braked effectually?

A. Well, if the crane was in operation it would be braked by means of the steam brake operated from the boiler, but if there was no steam on it could only be braked by means of the hand brake or block on the track.

Q. A steam brake with no steam on is of no use?

A. Absolutely.

Q. And did you say there was a brake, a hand brake?

A. When the crane is shipped from the factory to meet the requirements of the Interstate Commerce Commission it is necessary to put on a hand brake.

Q. Do you know how those cranes and their booms are handled in their shipment on trains?

A. Why, I have seen some of them, yes, sir.

Q. How is the boom handled or stowed, say, on a gondola or idler car attached to—

A. Why, generally the booms are lowered into the car on top of blocking, this blocking being located on the floor of the car.

(Testimony of Ralph S. Drury.)

Q. Did this barge have any hose or air connection—

MR. GORHAM: Barge?

Q. Did this crane have any hose or air connection whereby it could be hooked up with the air lines of other cars, railroad cars?

A. There is a single pipe line running through the lower frame of the crane with hose connections at each end so that when the crane is shipped in train it may be connected through the crane into the next car. That air pipe has no connection to the brakes.

THE COURT: Just let the train's air through?

THE WITNESS: Yes, sir. There is no auxiliary air drum on the crane, which would be necessary to brake it.

Q. In other words, the crane then acts just as a bridge for the air line from the car preceding to the car following?

A. Yes, sir. That is the way it is shipped from the factory. If there was any modification made I don't know.

Q. Do you know how long air is of any force and effect when put on railroad cars, assuming the equipment to be in good order and condition?

MR. GORHAM: I didn't quite get the question.

(Testimony of Ralph S. Drury.)

Q. How long is air good or of effect when put on railroad cars, the equipment in good order and condition?

A. Well, I don't exactly pose as an air brake expert, but in my railroad work I should judge that it might not be effective more than from probably thirty minutes maybe to an hour maybe at the most.

MR. COSGROVE: That is all.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. This gear below the deck of the crane and between the trucks, which you say you take out when the crane is in train, in route, is that usual to take it out in shipment?

A. I didn't catch the last of it. I beg your pardon.

Q. The gear which you say was below the deck and between the trucks of the car that is removed, is it usual to remove that when the locomotive crane is shipped?

A. Well, it is not always usual to take it off, no. It can be ~~shipped~~ slipped sideways and the collar on the same shaft. Sometimes they do remove them though.

Q. What is the object of removing them; for protection of the parts?

(Testimony of Ralph S. Drury.)

A. That is about all. It could be tightened up, I suppose, on the shaft again and left there.

Q. Who determines whether it shall be removed or not; the railroad people?

A. No; the crane operator I suppose.

Q. If that gear had been in I understand you to say that the braking on the trucks could not have been locked by hand through the means of that device, that gear?

A. No, not the brakes on the truck.

Q. The brakes on the wheels of the trucks, I mean.

A. No, they could not be exactly locked by hand. The gearing would all be locked integrally through up to the operating lever.

THE COURT: They would drag on the swinging of the crane?

THE WITNESS: Yes, sir; in other words, the weight of the crane would have to overrun the gearing. The operating levers have no connection with the brakes.

Q. Where would be the center of gravity of the crane?

A. Well, that would depend, of course, on whether the crane—how much coal it had in it and how must water was in the tank.

Q. Supposing there was an absence of both coal and water?

(Testimony of Ralph S. Drury.)

A. Well, of course, a person would have to figure that out. The only thing I would say that in standard lifting capacities for rating of the crane it is rated on the basis of the tank half full of water and the coal tank half full of coal. On that basis with the boom practically flat, the center of gravity would be approximately two and a half feet in front of the center swinging pin.

Q. And how high above the deck or below the deck—

A. Well—

Q. —would the boom at rest be horizontally?

A. It would be approximately five feet and a half above the rail.

Q. Above the rail. And how high is the top of the deck of the crane above the rail?

A. It is approximately, as I remember, about four feet and two inches.

Q. So it would be a little above the deck of the crane in a vertical direction?

A. It would be in the neighborhood of sixteen to eighteen inches, yes, sir.

MR. GORHAM: That is five feet what?

THE WITNESS: About five feet six inches.

Q. That was the boom in the gondola car horizontally resting on the dunnage in the car?

A. No, not with the boom resting on the car.

(Testimony of Ralph S. Drury.)

The boom would have to be supported through the upper rotating post in order to give it center of gravity; in other words, you never figure with the boom off because the crane could not do any work.

Q. So you don't know where the center of gravity would be if the boom was resting in the gondola?

A. Not exactly, no, but it would be behind the center pin.

Q. It would be behind the center pin and where would it be in a vertical direction?

A. Well, it would be practically the same height.

Q. As before?

A. Yes, sir.

Q. I understood you to say in preparing these cranes for shipment the boom rests upon timber on the floor of the gondola car.

A. Yes, sir.

MR. GORHAM: That is all, Mr. Drury.

MR. COSGROVE: I would like the privilege of asking another question.

REDIRECT EXAMINATION.

BY MR. COSGROVE:

Q. This drive that you referred to as controllable through a lever in the cab is what you call the thermoid friction drive, isn't it?

(Testimony of Ralph S. Drury.)

A. Yes, sir.

Q. And that is the drive that is used in sending the car or the crane up a steep hill, is it not, or holding it when going down a steep hill?

A. Well, yes, in sending it up it is not exactly used to hold it; it is to drive the crane.

Q. In sending it down it is used, is it not?

A. It consists of two double frictions, one used, going in mesh, to run the crane up hill, for instance if it was on the level or on a hill, and the other friction is used to run it in the opposite direction, whether it is on the level or on a hill.

Q. So that that same friction is used to run the crane up a steep hill and if you put that on the car standing on the level it then affords this same retardation that is the equivalent of the pushing of the car up the hill, is it not?

A. Well, as far as the friction portion of it is concerned, yes; in other words the tendency to slide between the frictions, yes; but without power applied it would not be equal to the push going up the hill quite, because they would have to add power to that.

Q. If the crank pins are wedged is the car well braked?

THE COURT: I didn't understand it.

Q. If the crank pins are wedged is the car well braked?

A. The crank pins of the engine?

Q. Yes.

A. No, sir, I would not consider it was.

THE COURT: You will have to explain that to me before it means anything to me.

MR. COSGROVE: We will dismiss the witness with that. That is all.

(Witness excused.)

BRUNO HERMANN, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. You are the Seattle manager of J. B. F. Davis & Son?

A. Bruno Hermann.

Q. You are Seattle manager of J. B. F. Davis & Son?

A. Marine Department.

Q. Marine department of insurance brokers; they are insurance brokers, aren't they?

A. Insurance brokers and agents.

Q. They are the agents for the Standard Marine Insurance Company, Ltd., Respondent in this case?

A. Yes, sir.

Q. Have you the letter from the Chesley Tug & Barge Company and the invoice accompanying

(Testimony of Bruno Hermann.)
that letter with reference to the loss of the idler car off Chesley No. 1 in tow of Ketchikan II?

A. Yes, sir.

Q. In February, 1926?

A. I don't know whether I showed them to Mr. Cosgrove or not. Mr. Cosgrove, did you see them?

(Papers handed to Mr. Gorham by Mr. Cosgrove.)

Q. Have you been in the court room during the morning?

A. During when?

Q. During the morning have you been in the court room?

A. Yes.

Q. You understand there was a gondola car, an idler car, on this barge?

A. I do.

Q. Now we are referring to that gondola car that was called a B. & O. car No. 253952—that is just to identify it—was that car insured through your office?

MR. COSGROVE: I object, if the Court please, unless counsel is referring to the policy sued upon.

MR. GORHAM: No. I am referring to—what is the name of that company?

MR. COSGROVE: The North British Mercantile.

MR. GORHAM: North British Mercantile Insurance Company.

THE COURT: What is the purpose?

MR. GORHAM: The purpose is to show by this witness that this car was insured by the North British Mercantile Insurance Company at a valuation of $2500.

THE COURT: Some bearing upon the value of it?

MR. GORHAM: Yes, that is all. And that the depreciated value of the car was appraised as of February 2, 1926, by the Master Car Builders' Association, a standard organization, at $2504, and that this Mr. Hermann's company, the firm there in Seattle, settled for that loss under that policy for $2500, the maximum amount under the policy.

THE COURT: Any objection?

MR. COSGROVE: Yes. I object to it as incompetent, irrelevant and immaterial.

MR. GORHAM: May I interrupt you just a moment?

MR. COSGROVE: Yes.

MR. GORHAM: The purpose of this is, if the Court please, because the City of Tacoma inadvertently when it secured the insurance on the crane

added into the description of the insured property the idler car, which they had not any interest in at all and could not recover anything. The gross value of those two pieces under the policy was $15,000. This particular idler car was insured under the North British Mercantile Company for $2500 maximum and the Master Car Builders' Association appraised its depreciated value at the time of its loss at $2504 and they settled for the maximum amount of the policy.

THE COURT: Objection overruled.

MR. COSGROVE: If the Court please, I would like to be heard on my objection there. I do not believe the Court gets the force of what he is trying to do. The suit that is brought here is a suit brought upon a policy which reads $15,000 as coverage for this gondola or idler car and crane. The Libellant pleads that he made a mistake and included the idler car when it should not have been included and then says in his pleadings that the crane he paid $7500 for—or the insurance coverage—and that the crane was worth twelve thousand five hundred and that the idler car was worth twenty-five hundred. He now comes in and asks us—he might just as well have gone to Anderson & Company here in Tacoma, if they had had insurance in some other company on the idler car, and asked them, as they ask us, to say

(Testimony of Bruno Hermann.)

what settlement they made upon this idler car with another company, which would have nothing to do with the value of the crane under this policy. Nobody is suing here for the value of an idler car. Nobody is claiming anything for an idler car. They are claiming it for a crane. And the idler car was settled for by another company under another policy with other terms and other conditions, not related in any way whatever to this insurance and is no part of the picture in this case. If counsel has something coming under this policy of insurance for the crane and he wants to prove the value of the crane there are the usual and customary methods of proving the value of that particular article without going out here and trying to prove it by indirection by proving the value of an idler car settled for under another policy by another company some place else. This only leads, if the Court please, to a wholly erroneous result.

THE COURT: It may be anticipating the defense to some extent. I will overrule the objection.

MR. COSGROVE: An exception.

THE COURT: Allowed.

MR. GORHAM: Have you those papers that I called for the other day?

Q. Under the North British Mercantile policy the maximum insurance was $2500 a car, was it not?

A. The maximum liability.

(Testimony of Bruno Hermann.)

Q. The maximum liability.

A. The maximum liability was not to exceed twenty-five hundred.

Q. And it might be less?

A. Yes.

Q. And the method of determining what was the liability of the company was by the Master Builders—

MR. COSGROVE: I object. The policy speaks for itself.

MR. GORHAM: I am asking him.

THE COURT: Objection oberruled.

Q. You determined the actual loss or liability by the survey of the Master Car Builders' Association; wasn't that your standard?

MR. COSGROVE: I renew my objection as not the best evidence. The policy would speak for itself.

THE COURT: Objection overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed.

A. Well, that was the method used.

Q. Yes. And this particular car was appraised by the Master Car Builders' Association at the time of the loss and the appraisal submitted to you at $2504, was it not?

A. Something like that.

(Testimony of Bruno Hermann.)

Q. Wasn't that the exact amount?

A. Possibly that was.

Q. We want to be exact, Mr. Hermann.

(Paper handed to Mr. Gorham by Mr. Cosgrove.)

(Conference between respective proctors.)

Q. (Continuing) I now hand you a paper which I ask to be marked for identification—

THE CLERK: Libellants' Exhibit "7."

(Paper marked Libellants' Exhibit "7" for identification.)

Q. (Continuing) —Exhibit"7," and ask you if you have seen that before?

A. Yes.

Q. That was taken from your files, was it not?

A. Yes, sir.

And this was the appraisement of the depreciated valuation of that B. & O. car, gondola, on this barge, lost, on the basis of which you settled for the loss of the car at $2500, was it not?

MR. COSGROVE: I renew my same objection to this that I made a minute ago.

THE COURT: Objection overruled.

MR. COSGROVE: And the same exception.

THE COURT: Allowed.

A. That is the basis, yes.

Q. That is the basis, and this paper, Exhibit

(Testimony of Bruno Hermann.)

"7," shows the total value of the car complete on the date of destruction, the depreciated value, $2504.84, does it not?

A. Yes, sir.

Q. And upon the basis—

THE COURT: What is the answer?

THE WITNESS: Yes, sir.

Q. And upon the basis of this survey and valuation you settled for the loss of that gondola car at the maximum amount of liability under the policy?

A. At $2500.

Q. $2500, and that was the maximum amount of the liability on that—

A. On that car.

Q. —on that car on that policy?

A. Yes.

MR. GORHAM: I offer that in evidence, if Your Honor please.

MR. COSGROVE: I move to strike the questions and answers on the grounds mentioned.

THE COURT: The motion is denied.

MR. COSGROVE: An exception.

THE COURT: Allowed.

(Paper referred to admitted in evidence and marked Libellants' Exhibit "7.")

Q. You insured that crane that is involved in this law suit, Mr. Hermann, through your office, on its voyage from Seattle to Potlatch?

(Testimony of Bruno Hermann.)

A. Seattle to Potlatch?

Q. Yes.

A. I don't recollect.

MR. GORHAM: Mark that for identification.

(Paper marked Libellants' Exhibit "8" for identification.)

Q. I show you paper marked for identification Exhibit "8," and ask if that was issued out of your office, J. B. F. Davis & Son, agents for the Standard Marine Insurance Company?

A. Yes.

Q. Is that on the idler car leaving Seattle for Potlatch in May, 1925—on the crane I mean?

MR. COSGROVE: Get the dates right, Mr. Gorham.

Q. (Continuing) May 25, 1925—May 28, 1925, on the locomotive crane on its own wheels?

A. Yes.

Q. And that crane was insured under this certificate No. 68811, Libellants' Exhibit "8," for $15,000?

A. Yes.

MR. GORHAM: We offer that in evidence.

(Paper handed to Mr. Cosgrove by Mr. Gorham.)

MR. COSGROVE: I object to this. This is an entirely different insurance policy.

MR. GORHAM: The same crane.

MR. COSGROVE: It has nothing to do with this loss. This is a policy of insurance on a shipment from Seattle to Potlatch. It hasn't anything to do—

THE COURT: It does not cover anything but the crane?

MR. GORHAM: It is on the same crane.

THE COURT: It doesn't cover anything else?

THE WITNESS: I don't think so.

MR. COSGROVE: It covers just the crane.

THE COURT: Objection overruled.

MR. COSGROVE: I will ask an exception to that.

THE COURT: Allowed. Do you claim there is any difference in the principle between what a crane buys and sells for on the market and what it insures for?

MR. COSGROVE: Do I—

THE COURT: I say, do you claim there is any difference in principle between admitting evidence of what a thing buys and sells for on the market and what it is insured for?

MR. COSGROVE: Yes, I do, because no one can tell at all the reasons that go to make up the valuations put in an insurance policy except the people who make these valuations themselves and

(Testimony of Bruno Hermann.)

you cannot tell anything until you bring the policy in itself.

MR. GORHAM: You can tell by the man who wrote it.

MR. COSGROVE: Furthermore, valuations in policies do not have anything to do with the market value whatever. That is a matter of insurance contract. For instance, there is not a schooner going up and down the coast here, not one, that is not valued at from two to three times its market value, not one. It has no relation to market value. And this is in the same situation. You may have a value for insurance which is one, two or three times as high as its market value, and to bring in policies here of this character to prove the value of this crane is to bring in perfectly worthless evidence.

THE COURT: Objection overruled.

(Paper referred to admitted in evidence and marked Libellants' Exhibit "8.")

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Was the seaworthiness admitted in the North British policy that you have been referring to?

A. Yes.

Q. That was admitted as between the insurer and the insured?

A. Yes.

Q. There is no such provision in the policies at suit or either of them?

A. No.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

HUGH G. PURCELL, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name, Mr. Purcell?

A. Hugh G. Purcell.

Q. And your business?

A. Manufacturers' representative.

Q. In what line of goods?

A. I handle Industrial and Brownhoist locomotive cranes.

Q. Where is your office?

A. Seattle, Colman Building.

Q. How long have you occupied that position?

A. About five years.

Q. Are you familiar with the Link-Belt crane?

A. Not particularly.

Q. Have you been familiar with the Link-Belt crane at all?

A. As a competitor, yes.

(Testimony of Hugh G. Purcell.)

Q. For two years?

A. For the last three or four years.

Q. In the market at Seattle what is the usual allowance for depreciation on cranes after their sale first hand, on locomotive cranes on their own wheels?

A. Well, that depends largely on the work the crane has been doing, the condition of the crane.

Q. If it has been well cared for so that it is kept in good order and condition both as to its boilers and tubes in the boilers, its engines and gear, what would a reasonable depreciation, year by year, be on the original cost value at Seattle?

A. I don't think there is any definite depreciation value on a crane. I think about twenty-five per cent if the crane was used four or five years would be fair depreciation if kept in good order.

Q. It would be about four or five per cent a year?

A. Something like that.

Q. You were not in the court room this morning?

A. No.

Q. You did not hear Mr. Harrington's testimony as to the condition of this crane?

A. No; no; I just arrived.

Q. You would not be able to tell what the value of this particular crane was on his statement that

(Testimony of Hugh G. Purcell.)

it was in good order and condition; it was built in 1918?

A. As I understand, this was an eight-wheel locomotive crane with a fifty-foot boom, one of the Link-Belt standard twenty ton cranes.

Q. Yes, built in 1918 and for six or eight months beginning June, 1925, up to February, 1926, used out on the Lake Cushman power project and the operator who operated the crane during all of that time testifying that he operated it continuously except Sundays and holidays and sometimes Sundays; that its boilers never leaked the entire time; it was in good order and condition both as to its boilers and tubes, its engines and gear; would you be able from that statement and the age of that crane and from what you know about the Link-Belt crane to make an estimate as to its value in the market on February 2, 1926?

A. We take them in exchange very often and we figure that we can get from seven to eight thousand dollars out of a crane after we take it in and see that it is in good condition. We have one now that is an Ohio, similar to that; we did not manufacture it, but we took it in a trade and we saw it was in good condition and our price on that is seventy-eight hundred.

Q. And that would be the market price for a second-hand crane, would it?

(Testimony of Hugh G. Purcell.)

A. The market varies with the demand; it runs around seven to eight thousand dollars. We sold one the other day of our own of the same general type to Bloedel Donovan for ten thousand dollars delivered at Bellingham, but we guaranteed it for a year. We took it and overhauled it and guaranteed it for a year. We have two similar cranes we are offering now for eight thousand dollars. They are all in good order and good shape and we are offering them at eight thousand dollars. We also have this Ohio, which we are offering for seventy-eight hundred.

Q. How do they compare generally with the Link-Belt crane, better or otherwise?

A. The Link-Belt has a very good reputation, about the same as the Ohio, the Brownhoist and the Industrial. It is a good crane.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Any guarantee with those that you are offering for eight thousand?

A. Only that they are in good condition. When we guarantee them we put them through the factory. They carry a year's guarantee. But these two that we have now we are offering for eight thousand, they have been overhauled and—

(Testimony of Hugh G. Purcell.)

Q. What acquaintance have you had with the Link-Belt crane?

A. No experience whatever except as a competitor, that is all; knowing the crane in competition with the cranes that we sell.

Q. Did you ever take in any?

A. No, we never did in my experience. I suppose other branches have.

Q. You don't know what the other branches took their's in at, do you?

A. No.

Q. Then you don't know anything about the sales of any second-hand Link-Belt crane as to what it cost?

A. Well, no definite knowledge of any crane, of any Link-Belt, that was ever sold except that they carry about the same value as the—

Q. You don't know what any second-hand Link-Belt crane ever brought, do you?

A. No; no.

Q. It is your guess that cranes of this type and character in good order and condition sell at about seven to eight thousand dollars; is that correct?

A. Yes, depending on the condition.

Q. Does it make any difference how long that crane has been manufactured and how long it has been in existence?

(Testimony of Hugh G. Purcell.)

A. It does not make as much difference as you think—It is more difference on how the crane has been used and treated is a greater factor than the age of the crane. The age of the crane is not always the determining factor. If the crane has been handled with reasonable care and kept in condition it is more important than the age of the crane.

Q. A crane that is eight years old, other things being equal, according to your formula, would be how much depreciated?

A. It would largely depend upon the ownership of the crane, how it depreciated. Different firms have different depreciations for them. Some wipe them out in five or ten years, the value entirely. It is entirely a matter of cost accounting valuations. I know a lot of firms we deal with and sell cranes wipe out the cost of a crane in six years, just wipe it off their books. Other men will wipe it off a small amount each year, carrying the depreciation over a number of years.

Q. Referring to the depreciation in terms of market value—

A. I could give you an illustration, if you want, of what I mean. I sold personally a crane here about four years ago and the company that used it used it very hard and broke a lot of it and then junked it and let the boiler freeze up and burst

(Testimony of Hugh G. Purcell.)

open, and the thing was all covered with cement and everything and really didn't have any value at all, a very small value the way it was treated; whereas, if that crane had been kept in any kind of condition and looked after like a piece of machinery should have, the depreciation would have been very small. You see what I mean.

Q. I gather from your answers then that second-hand cranes of similar type to this one in Seattle from 1926 to now bring about seven to eight thousand dollars?

A. Yes, if it is in good condition. If it is in poor condition I would say about seven thousand dollars. If it is in good running condition and the boiler is good, the tubes are in good shape and everything is in good shape, it ought to be worth seventy-five hundred dollars.

Q. That is regardless of its age?

A. Regardless of its age. Crane parts can all be replaced very readily, see. Wheels, car wheels and the gears and all that part, new tubes in the boiler, and a new shell on the boiler.

MR. COSGROVE: That is all.

MR. GORHAM: That is all, Mr. Purcell.

(Witness excused.)

MR. GORHAM: Now the statement of Mr. Summers, do you have it, Mr. Clark, Mr. Summers'

deposition? I am trying to get this testimony in order, if Your Honor please, and I think that closes our case with the exception of the evidence relative to the weather and the storm and the loss of the cargo on the barge, which would include all the camp equipment of Guthrie and would include the crane insured under this City of Tacoma policy and which was assigned to the Libellant. This is a statement made on the 23rd of December, 1927. It is not sworn to, both counsel having waived the oath. Oh, this is the witness Whitney. I want Mr. Summers'. That is in rebuttal.

THE CLERK: I don't know of any other deposition we have got here.

MR. GORHAM: We will have to ask permission, if the Court please, from the Court to introduce that tomorrow if we can find it between now and tomorrow by getting in communication with the Court Reporter who took it. It was taken several days ago.

MR. COSGROVE: In order to expedite this suppose you take the copy.

MR. GORHAM: Oh, have you got a copy? I never have had a copy.

(Paper handed to Mr. Gorham by Mr. Cosgrove.)

MR. GORHAM: This is good enough for me.

(Statement of Mr. Summers.)

THE COURT: Well, will that be filed?

MR. GORHAM: Yes, we will file this.

(William H. Gorham appeared for Plaintiffs and Howard Cosgrove appeared for Defendant as he has got it here.)

(Mr. Gorham read said statement, and proceedings were had thereon, as follows):

"STATEMENT OF M. B. SUMMERS, Meterologist in charge of United States Weather Bureau, Seattle, Washington.

BY MR. GORHAM:

Q. I hand you a statement"—

MR. GORHAM: Will that be satisfactory as to the statement? That is a carbon copy (showing).

MR. COSGROVE: Yes.

(Continuing reading):

"Q. I hand you a statement, Mr. Summers, dated February 6, 1926, out of this office, and ask you if that is your signature attached thereto?

A. Yes, it is.

Q. Is that statement made by this office?"

MR. GORHAM: This was at the weather bureau in Seattle.

(Continuing reading):

"A. Yes.

Q. That is a copy of the weather record as shown by the records of this office on that date?

(Statement of Mr. Summers.)

A. Yes.

Q. Will you interpret that statement, Mr. Summers, so that the Court may understand just what it means, your method of computing the gauge of the wind and what that statement refers to as to velocity of the wind at any hour?"

MR. GORHAM: So I will read now the statement, if the Court please.

(Reading):

"UNITED STATES DEPARTMENT OF AGRICULTURE, WEATHER BUREAU, Seattle, Washington.

February 6, 1926.

Chesley Tug & Barge,
Seattle, Washington.

Gentlemen:

In response to your telephone inquiry of this date, the following data, taken from the records of this office, are submitted:

The barometer at Seattle fell steadily from 5 a. m., February 2, 1926, until 9 p. m. of that date, and then rose steadily until 9 a. m., February 3, when it began to fall again. At 5 a. m. of the 2nd it read 29.82 inches; at 9 p. m., 29.43; and at 9 a. m. of the 3rd, 29.71. These readings are all reduced sea level.

The wind was from the southeast and east

(Statement of Mr. Summers.)

between 6 p. m. of the 2nd, and 12:30 a. m. of the 3rd and from the south until 7 a. m. The hourly wind movement during the 13 hours ending at 7 a. m., of the 3rd, was as follows: In the hour ending at 7 p. m., 8 miles; hour ending at 8 p. m., 5 miles; hour ending at 9 p. m., 10 miles; hour ending at 10 p. m., 10 miles; hour ending at 11 p. m., 18 miles; hour ending at midnight, 13 miles; hour ending at 1 a. m., 19 miles; hour ending at 2 a. m., 28 miles; hour ending at 3 a. m., 26 miles; hour ending at 4 a. m., 22 miles; hour ending at 5 a. m., 14 miles; hour ending at 6 a. m., 18 miles; and hour ending at 7 a. m., 12 miles.

For the 5 minutes beginning at 1:33 a. m. of the 3rd, the wind blew at the rate of 36 miles an hour, and in the 5 minutes beginning at 2:10 a. m., at the rate of 34 miles an hour. Both of these high velocities were from the south.

Respectfully,

(Signed) M. B. Summers,

M. B. Summers,

Meteorologist, in charge."

MR. GORHAM: Then he answers:

(Continuing reading):

"A. When the term 'hourly wind movement' is used it refers to the actual wind move-

(Statement of Mr. Summers.)

ment in any particular hour. By this is meant that if a feather is placed in the wind at the beginning of the hour, at the end of the hour the feather would be a certain number of miles away from the initial point. Thus, if the wind movement were ten miles in an hour the feather would have traveled ten miles in that hour.

Q. Let me ask you, those notations at the bottom as to increased velocity, how is that increased velocity manifested in your machine as against the hourly movement of the wind?

A. The weather bureau computes maximum velocities of the wind on a basis of the highest wind for a five minute period. This rate is always as high as or higher than the total wind movement for that particular hour.

Q. So that the memorandum in the last paragraph of your statement of February 6, 1926, the velocity for the five minutes beginning at 1:33 a. m., on the 3rd, the wind blew at the rate of 36 miles an hour, and in the five minutes beginning at 2:10 a. m. at the rate of 34 miles an hour, were the highest velocities reached in those respective hours?

A. Yes.

Q. And those excessive velocities were from the south?

(Statement of Mr. Summers.)

A. Yes, both of them were from the south.

MR. GORHAM: That is all.

BY MR. COSGROVE:

Q. The so-called high velocity five minute periods, are they noted by your office if the hourly wind movement is less than thirty miles an hour?

A. No, they are not.

Q. Then take your third paragraph of this statement in which you cover hourly wind movements for the thirteen hours ending at 7 a. m. on the 3d of February, 1926, the hourly wind movement during those thirteen hours was never in excess of thirty miles an hour, except as stated in the last paragraph of your statement, is that correct?

A. It was not above thirty miles an hour, except as indicated in the last paragraph of that statement.

Q. Now inquiring as to your term 'hourly wind movement,' does that mean that for that full hour, each and every moment of it, the wind was at the rate given in your third paragraph?

A. No, indeed.

Q. That rate might be higher or lower than the rate given by you, might it not?

A. It might be higher than given in the

(Statement of Mr. Summers.)

second paragraph but it would not be higher than given in the third paragraph.

Q. But it at no time would have been more than thirty miles an hour, except as noted in the last paragraph?

A. That is corect. We do not tabulate in our records maximum hourly velocities unless they exceed thirty miles an hour.

Q. At what point were those readings taken?

A. From the roof of the Hoge Building, Second and Cherry Streets, Seattle, Washington.

Q. How high is that above sea level?

A. 250 feet above the ground.

Q. You mean the ground at Second and Cherry?

A. At Second and Cherry. It would be somewhat higher than that above sea level. I could not give you the exact elevation of Second and Cherry.

Q. Compare the hourly wind movement on salt water and 250 feet above?

A. My opinion would be that right down at the surface of the water the wind would not be quite so high as it would at an elevation of 250 feet unobstructed by any buildings or any-

(Statement of Mr. Summers.)

thing of that kind, that up a short distance above the water the velocity would be somewhat greater than it would be at the surface, there being a certain amount of friction by the water on the air.

Q. What difference, if any, would be found or is found between hourly wind movements at Seattle and the point in Puget Sound a mile or a mile and a half off of Meadow Point?

A. I could not answer that question because it would be only an opinion. I never made any observations of wind velocities there at that point or any other point aside from the roof of the Hoge Building. But the velocity at any point in the Sound I would say would be dependent somewhat on the location of the point with respect to the wind at the time, in other words, the shore topography would affect the wind velocity to a certain extent, depending on the direction of the wind.

Q. It is hardly likely, is it, that during the thirteen hours you have mentioned in this statement, that the wind exceeded at the point I have just mentioned the hourly wind movements you have given in the statement?

A. I would not think so.

Q. What I intended to ask was, is it likely

(Statement of Mr. Summers.)

that at the point in the Sound I have just mentioned, and during the thirteen hours mentioned in your statement, that the wind velocity there was higher than the hourly wind velocities or hourly wind movements mentioned by you in this statement?

A. Will you put that question this way? May I make a suggestion to ask the question this way: Is it likely that the hourly wind movements at the point mentioned were higher than the hourly wind movements mentioned in your statement? You said velocity of hourly wind movements?

Q. Let my question be understood to be as stated by Mr. Summers.

A. I do not think they would.

Q. (By Mr. Gorham) Your answer in this includes the wind movement in the two five minute periods?

A. Yes.

Q. You think it would be at least that velocity at that point?

A. No; it would be higher than that.

Q. Do you know where Meadow Point is?

A. Only roughly. I am not well enough acquainted with the geography of the Sound to tell you that.

Q. I want to call your attention to the lo-

(Statement of Mr. Summers.)

cation north of Salmon Bay in Ballard and between the opening of Salmon Bay and Richmond Beach; it is just to the south of Richmond Beach; it is this side of Everett. The Government has no weather bureau station or wind gauge any nearer that point than the Hoge Building, does it?

A. No, sir.

Q. (By Mr. Cosgrove) Is it possible, Mr. Summers, supposing you have your station here on top of the Hoge Building and you had another one ten or fifteen miles away, for the other station to fall in at the same five-minute reading referred to ~~you~~ by you?

A. It is quite possible, that is, assuming that the elevation in the anemometer were the same.

Q. Is it possible that at the point in the Sound which I have just mentioned that during these two five-minute periods mentioned in your statement that the wind movement might not have been as stated here, 36 and 34 miles an hour?

A. It might not have been. Yes, that is possible. However, I do not think that the wind movement down near the surface of the water was any higher than these velocities as stated previously.

(Statement of Mr. Summers.)

Q. That does not quite cover the question I intended to ask. Is it possible that at the two five-minute periods mentioned in your statement the wind movement at the point mentioned in the Sound might have been substantially less than that mentioned in the statement?

A. Well, that would depend on the local topography and the influence of the shore line. If the shore line were such as to obstruct the southerly wind then it probably could have been some less, considerably less or substantially less.

Q. If you had a level area at Seattle with no buildings or no obstruction of any kind whatever and the readings were taken from the same altitude at the same time, would these five minute periods of wind movements of five and ten miles practically show the same rates?

A. Practically the same. They might differ by a few miles, but they would show practically the same velocity.

Q. What do you mean by a few miles?

A. I would say that would not differ by more than four or five miles.

Q. Four or five miles is quite a difference?

A. It would depend somewhat on whether one place or the other were nearer the edge of the storm. Naturally there is bound to be some point in the storm where the maximum velocity

(Statement of Mr. Summers.)

over any particular area occurs and a gradually diminished velocity out towards the edges. That goes without saying. Now if one of those places were more nearly the edge of the storm area than the other place it would have a lesser velocity.

Q. (By Mr. Gorham) Is there anything to indicate whether the edge of this storm area was at the Hoge Building or at the point off Meadow Point on Puget Sound?

A. No, there would be nothing to indicate that.

Q. Then when you say it probably had less do you mean probably or possibly?

A. I said down at the surface of the water. The velocity down at the surface of the water here at the Hoge Building, if the Hoge Building were right beside the Sound, would be less than it was up here at 250 feet. That is what I had reference to when I said it was possibly less.

Q. (By Mr. Cosgrove) Mr. Gorham used the word 'storm.' Most all movements of wind are classified generally as storms, aren't they, by you?

A. When they reach thirty miles an hour. Anything less than that would hardly be classed as a storm. Of course that is a very elastic term.

(Statement of Mr. Summers.)

Q. That does not mean that you draw a dividing line of thirty miles to denote violence on the one part and calm on the other?

A. No, it does not.

Q. I notice in the second paragraph of this statement you have some barometric readings.

A. Yes.

Q. Are those changes in those readings unusual at that time of the year?

A. The magnitude of the changes is not unusual. But the fact that after reaching the minimum reading at 9 p. m. of the second, the barometer rose steadily until 9 a. m. of the third, and then started to fall again, was unusual.

Q. Is it not a fact that frequently at that time of the year the barometer rises to a point higher than mentioned here and then goes to a point lower, and vice versa?

A. Yes. Well, I would not say frequently, but I would say occasionally. I would not say frequently.

Q. What was there, if anything, unusual about that rise or lowering of the barometer, that you refer to the lowering of it or the rising of it?

A. In the fact that it started to fall after it had risen. There were two falls in the barom-

(Statement of Mr. Summers.)

eter noted. One was a minimum at 9 P. M. of the second. Then it started to fall again at 9 A. M. of the third after an intervening rise. But as I remarked, after 9 A. M. probably would not be pertinent to the case. I am only mentioning it because it appears here in the letter. That fall you refer to took place after 9 A. M. of the third.

Q. The second fall?

A. Yes, the second fall.

Q. After 9 A. M. of the third?

A. After 9 A. M. of the third.

Q. That is the unusual part?

A. That is the unusual part of the performance of the barometer."

THE COURT: What was the time when this loss occurred?

MR. GORHAM: About 3:50 A. M. of the third, if Your Honor please.

(Continuing reading.)

"MR. GORHAM: That is all. Now, Mr. Summers, would you like to have this written out and read it?

MR. SUMMERS: Yes, I think it would be better."

MR. GORHAM: So we left the duty of transcribing it to the Reporter. He has furnished Mr.

Cosgrove one, but not the original copy, but counsel agrees that these copies may go in.

MR. COSGROVE: Yes. I want to call attention to the last page of Mr. Summers' comment that the unusual part that he referred to was the fall after 9 o'clock on the third, which was after the loss.

MR. GORHAM: Yes, an unusual action of the barometer.

THE COURT: The Court will be at recess ten minutes.

RECESS.

MR. GORHAM: I would like this statement of Mr. Summers that we introduced marked as an exhibit, because it is only referred to in Mr. Summers' statement. We offer it as such, Mr. Cosgrove.

MR. COSGROVE: I beg pardon.

MR. GORHAM: We offer this statement signed by Mr. Summers that is attached to his statement.

MR. COSGROVE: No objection.

THE COURT: Admitted.

THE CLERK: It will be "9."

MR. GORHAM: (Showing paper to Mr. Cosgrove) And we offer this statement.

(Paper referred to admitted in evidence and marked Libellants' Exhibit "9.")

MR. GORHAM: We offer an extract from the tide tables Pacific Coast, North America, 1926, Department of Commerce, showing high and low water

time and height at Port Townsend and Seattle on February 2nd and February 3rd, 1926. We offer that in evidence. That is "10"?

THE CLERK: That is No. "10."

MR. COSGROVE: No objection.

THE COURT: Admitted.

(Document referred to admitted in evidence and marked Libellants' Exhibit "10.")

HARRY MORTENSEN, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. How old are you, Mr. Mortensen?

A. Forty-seven.

Q. What is your occupation?

A. Sailor; seafaring man.

Q. How long have you been a seafaring man?

A. Practically since I was seven years old.

Q. In what capacity?

A. Oh, in sailing ships and steamers all over the world.

Q. Have you been continuously in that occupation for the last twenty or thirty years?

A. No, sir. I have been longshoring and painting and several other occupations.

Q. How long have you been at sea altogether?

A. Practically ten years.

(Testimony of Harry Mortensen.)

Q. Is that including overseas?

A. Overseas and all.

Q. You are an employee of the Chesley Tug & Barge Company?

A. Yes, sir.

Q. How long have you been in their employ?

A. Probably two years within a month or so.

Q. In what capacity?

A. Oh, deck hand, cooking and second; in this instance here second.

Q. Do you know the tug Ketchikan II?

A. Yes, sir.

Q. Owned by the Chesley Tug & Barge Company?

A. Yes, sir.

Q. Is that a motor tug?

A. A motor tug, yes.

Q. How much of a crew does it carry?

A. Three at a time.

Q. A master, second and—

A. And the cook.

Q. —and the cook? Have you ever acted as second on the Ketchikan II?

A. Yes, sir.

Q. How long?

A. Two months; a few days short of two months.

(Testimony of Harry Mortensen.)

Q. How?

A. A few days short of two months.

Q. Have you ever acted as second on any other motor tug?

A. Yes, sir.

Q. Were you second on the Ketchikan II leaving Potlatch February 2, 1926, with the car barge Chesley No. 1 in tow with five cars and a locomotive crane on board—

A. Yes, sir.

Q. —bound for Seattle?

A. Yes, sir.

Q. What were your watches on that vessel on that voyage?

A. From 12 to 6 in the morning and 12 to 6 in the afternoon.

Q. Do you remember where you were when you went on watch at 12 o'clock midnight on the morning of February 3rd?

A. Yes, sir.

Q. Where?

A. Within a mile—a half a mile of Apple Tree Point; that is a light house.

Q. Bound for Seattle?

A. Bound for Seattle.

Q. You had come to that point from Potlatch?

A. From Potlatch, yes.

THE COURT: Just where were you?

(Testimony of Harry Mortensen.)

THE WITNESS: A half mile off the light.

Q. Is there a light at Apple Tree Point?

A. Yes.

Q. A State light?

A. It is a blinker.

Q. How long a hawser did you have out?

A. Practically four hundred feet, I should judge; I never measured it; four hundred feet at least.

THE COURT: I didn't catch all that last. A little less did you say?

THE WITNESS: At least four hundred?

THE COURT: At least four hundred?

THE WITNESS: Yes, sir; nothing less.

Q. What was the weather when you came on watch at 12 o'clock midnight of the morning of the 3rd?

A. Well, it was fairly good weather; it was a ten mile breeze, probably a twelve mile breeze blowing, as we judged.

Q. And you were within a half a mile of shore?

A. A half mile off shore.

Q. Off shore?

A. Yes.

Q. From that point did you follow the contour of the shore or did you strike out in the Sound?

A. I followed up to the next point, President Point, across Kingston Bay.

(Testimony of Harry Mortensen.)

Q. And how far off President Point were you when you passed President Point?

A. Three quarters of a mile I should judge.

Q. And what was the weather then?

A. It was practically the same.

Q. And about what time was it then?

A. It was about a little before 1 o'clock.

MR. COSGROVE: What was that last question and answer?

MR. GORHAM: What time was it then? And he said about 1 o'clock.

THE WITNESS: Yes; before 1 o'clock.

Q. What was your course from President Point?

A. To Seattle?

Q. What was your next course?

A. Southeast; a southeast course.

Q. Was that true or magnetic?

A. True.

Q. And how long did you run that course?

A. Well, it would be to the time the car barge—to the accident do you mean?

Q. Well, just how long did you run it; did you run it up to the loss of the car?

A. Yes.

Q. What was the weather from 1 o'clock on?

A. It was getting stronger wind. At 1:30 she was pretty strong.

(Testimony of Harry Mortensen.)

Q. And what was the condition of the sea from President Point on up to the time of the loss?

A. The further I got out it got heavier sea on account of the flood tide; the wind up against the tide made a pretty strong sea.

Q. When was it at its highest, do you know, the wind; do you remember?

A. About 2:30.

Q. And when was the sea the most boisterous?

A. The sea was the most boisterous after the squall was over, after the heavy weather.

Q. In other words, you had heavier sea after 2:30 than you did before?

A. Yes; around three o'clock.

Q. Do you know how fast you were going over the ground?

A. Oh, about a mile an hour.

Q. Could you see your barge?

A. I could see it, not plainly; pretty dark.

Q. Did the barge have lights on it?

A. Lights.

Q. What kind of lights?

A. Just little lanterns, you know, stern lanterns.

Q. How many lights did it have?

A. Two.

(Testimony of Harry Mortensen.)

Q. And how were they situated as regard the barge fore and aft or athwartships?

A. Fore and aft; the after light a little higher than the forward light.

Q. And how were they situated with regard to being in the center of the barge or on the starboard or port side?

A. On the center of the barge.

Q. Could you see those lights at President Point?

A. At all times.

Q. Were those lights on the barge or on the cars?

A. On the car.

Q. What was the last time you saw the lights?

A. About fifteen minutes past three or 3:15.

Q. Two-fifty?

A. Three-fifteen.

Q. Three-fifty?

A. Three-fifteen.

Q. Three-fifteen?

A. Yes, sir.

Q. And when did you lose your load?

A. It was at three-thirty that I seen the load was gone.

Q. Was that by your pilot house clock?

A. Yes; I think it was three-thirty.

(Testimony of Harry Mortensen.)

Q. Did you have any warning of the load spilling?

A. No, sir.

Q. Was there any stoppage in your engines after the time you left President Point until the barge spilled its load?

A. No stoppage. After the accident I stopped the engine and called the Captain.

Q. Was that the first time the engine had been stopped after leaving Point President?

A. Yes, sir.

Q. How did you know you spilled your load?

A. By looking at the scow, at the dark spot standing on end; I could see the end of the scow standing up, and when I stopped the engine she straightened out.

Q. You stopped the engines?

A. Yes.

Q. Could you feel it on board, the difference in the stress in your tow line, would there be any difference there?

A. No, I didn't notice anything at all; I didn't notice it.

Q. You saw the barge on end?

A. Yes.

Q. In the distance?

A. In the distance. It was pretty dark.

(Testimony of Harry Mortensen.)

Q. Well, did you know the cars went over then?

A. Yes.

Q. How did you know it?

A. I could see when the scow was lit up you couldn't see no cars on the barge.

Q. What did you do after spilling the cars off the barge?

A. The Captain came up and we started the engine again and proceeded to Seattle.

Q. How long after the spilling of the cars off the barge did the Captain come up?

A. He was up practically the same time; he was coming up when I was going to call him. He heard me stopping the engine and he come up.

Q. In crossing the Sound from President Point did the tug at any time take sea?

A. Yes, it was taking sea from 1:30 on over the deck all the time.

Q. To what extent did it take the sea?

A. Well, the tug was full of water several times; a pretty high sea going.

Q. How much freeboard is there on the Ketchikan forward?

A. From the water's edge you mean?

Q. Yes.

A. Oh, about six feet.

THE COURT: Freeboard?

(Testimony of Harry Mortensen.)

MR. GORHAM: Six feet he said, if the Court please.

THE COURT: Freeboard?

MR. GORHAM: Freeboard, yes, forward.

THE WITNESS: From the water up to the bow of the tow boat.

Q. How had the barge been riding under tow between Appletree Point or Apple Cove Point and Point President?

A. To all appearance like she done the whole trip.

MR. COSGROVE: I didn't get that answer at all.

THE WITNESS: To all appearance the way she done on the whole trip.

Q. And how was that?

A. Naturally the way we left Potlatch.

Q. Would you be able to estimate the velocity of the wind at its highest that night after leaving Point President?

A. I figured on thirty-five up to a forty mile wind at the highest.

Q. That is your judgment?

A. My judgment, yes.

Q. So far as you know, when you saw the barge in an upright position the cars all went off together?

(Testimony of Harry Mortensen.)

A. I could not tell.

Q. You could not tell; you do not know?

A. I didn't see it.

Q. You know that when she came back on an even keel or level the cars were all gone?

A. The cars were all gone; you couldn't see nothing but just a shadow.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. What time did the tug and tow leave Potlatch?

A. Six o'clock on the second; six o'clock in the morning.

Q. Were you awake and up at that time?

A. Yes.

Q. Were the Captain and the other member of your crew awake and up?

A. Yes.

Q. At six o'clock in the morning, that is February 2nd?

A. Yes, sir.

Q. How light was it then?

A. Not very light.

Q. Rather dark at that time, wasn't it?

A. Well, it all depends on the moon, you know. Sometimes it is pretty light. I don't remember.

(Testimony of Harry Mortensen.)

Q. I am asking you how it was at this particular time?

A. I could not tell you.

Q. You don't recollect whether there was any moon or not?

A. No.

Q. Was there any moon at the time of the loss?

A. No, sir.

Q. What?

A. No, sir; I don't remember seeing the moon.

Q. You don't remember whether there was a moon or not?

A. No.

Q. Now at the beginning of the voyage at six o'clock in the morning where did you pick up this barge?

A. At Potlatch.

Q. I know, but was it on the gridiron or off the gridiron?

A. It was on the gridiron when we picked it up.

Q. It was on the gridiron when you picked it up?

A. Yes, afloat; the tide lifted it up over the grid at the time we took it.

Q. How did you take it off of the gridiron?

A. Put a tow-line on it and took it off.

(Testimony of Harry Mortensen.)

Q. Fastening aft or forward?

A. Forward; aft on the tow-boat; on the fore part of the scow; the towing end of the barge; on the after end of the boat.

Q. You had lines on both ends?

A. Both ends of the scow, no, sir.

Q. They were on the forward end?

A. On one end of the scow the bridle, what we call the bridle.

Q. That is the end—

A. The high end.

Q. —on which the cars were loaded?

A. Yes, sir.

Q. Immediately upon pulling the barge off the gridiron did you begin voyage to Seattle?

A. Within a few minutes.

Q. Do you know when the cars were put on the barge?

A. They were put on—I could not tell the exact time, but I know they were put on the day before.

Q. Do you know what time the day before?

A. I could not tell you. It was in the afternoon sometime.

Q. Did you have anything to do with putting them on the barge?

MR. GORHAM: If the Court please, this is not cross examination. That is the respondent's case.

(Testimony of Harry Mortensen.)

If the Court will indulge me just a moment, as between an insurer and insured there is a presumption of law of seaworthiness. That is the ruling of our Circuit Court of Appeals and that is the ruling of the English courts. Brown of the Southern District of New York said that where there is presumption of law there need be no averment and where there is no averment there need of course be no proof. We have not alleged seaworthiness of this barge. The law presumes it is seaworthy. The burden is not upon the insurer, the respondent here, to allege and prove unseaworthiness. That is the respondent's case and they should not be permitted, unless we have gone into it ourselves, to cross examine the witness on the question of the seaworthiness of that barge. That is on their own initiative. If they will make the witness their own witness then we can't object, but they have no right under the law to cross examine this witness upon the matter of seaworthiness of that barge as to its storage or the other defenses they have when we have not gone into it in our case in chief.

THE COURT: Objection overruled.

MR. GORHAM: We take an exception, if the Court please.

THE COURT: Allowed.

MR. COSGROVE: Read the question.

(Testimony of Harry Mortensen.)

(Question read.)

A. No, sir, only representing the Captain with this stowage.

THE COURT: I don't hear all you say.

Q. Did you have anything to do with putting these cars on this barge?

A. The train put them on. I staid on the barge when they were put on, but I take my orders from the Captain what to do.

Q. Did you do anything in connection with the putting of the cars on the barge?

A. By securing them.

Q. You secured them?

A. Helping to secure them.

MR. GORHAM: Just a minute, Mr. Cosgrove. If the Court please, may my objection run to all this examination?

THE COURT: It will be so understood.

MR. GORHAM: Then my exception to the Court's ruling.

THE COURT: Exception allowed.

Q. Who did the securing of the cars?

A. The train crew and the Captain and me.

Q. The train crew and the Captain of the barge and you?

A. No, the Captain of the tow-boat.

Q. The Captain of the tow-boat and you?

(Testimony of Harry Mortensen.)

A. Yes.

Q. Who was the other member of the crew?

A. The cook.

Q. What was his name?

A. Mikelson.

Q. Your name is Mortensen?

A. Yes, sir.

Q. And they had a cook by the name of Mikelson?

A. Yes, sir.

Q. Did Mikelson assist in the loading and fastening of these cars on the barge?

A. I could not tell you if he was there that particular time, but lots of times he did help us. He was cook.

Q. You don't know whether he did or did not this time?

A. I could not tell you.

Q. What did you do with helping fasten these cars on the barge?

A. Helping with the timbers.

Q. What particular things did you do?

A. Helping all around with everything.

Q. What did you do now? Just simply saying you helped— What did you do?

A. I helped to put in the cross pieces on the back end of the trucks of the center car, the center

(Testimony of Harry Mortensen.)

of the crane, in between the—what do you call them —the after timber on the barge, helped to put timbers in under the wheels to stop them from rolling back and forth, and the same on the front.

Q. I will go back of that a little bit. How were the cars put on the barge; what force brought the cars on the barge?

A. A locomotive.

Q. That is the locomotive that brought them down from Lake Cushman?

A. I could not tell you whether it was the same or—

Q. And when they were being backed on where were you?

A. I was on the barge.

Q. Who did the signalling as to how far these cars would go on the barge?

A. The train man.

Q. Who?

A. The train man; the conductor.

Q. Did you have anything to do with that?

A. No.

Q. Now when they ran these cars on the barge was there any blocking or timbers already laid between the after end of the barge and the cars?

A. There is always a stationary timber on the after end of the barge bolted on stationary all the time.

(Testimony of Harry Mortensen.)

Q. All right, but was there anything in front of that?

A. No, sir.

Q. Nothing in front of that stationary timber?

A. No, except the rails, that is all.

Q. Which track did they put cars on first?

A. I could not tell you.

Q. You don't know?

A. I don't remember.

Q. How many tracks did the barge have?

A. Three tracks.

Q. How many cars went on each track?

A. Two on each side and the gondala and the crane in the center.

Q. Now did they run all those cars right up against this bolted log on the end?

A. The outside cars probably they did, but the center car they did not. The wheels on the crane would not reach it; they overhang—they didn't come up close enough, that is the car we blocked off between the truck.

Q. Now let us take the cars on the outside tracks; those wheels you think ran right up against this bolted log?

A. Yes, sir.

Q. There were no timbers, ties or anything between the bolted log and the wheels; were there or weren't there?

(Testimony of Harry Mortensen.)

A. I don't think so.

Q. Were you working at that end helping block?

A. I was helping all around; not exactly; I can't tell you exactly.

Q. All right. Now let us go to the middle track. Was there any timber, loose or otherwise, just forward of the bolted timber, the one bolted to the deck?

A. Not at the time it was put in there.

Q. All right. Then on the middle track the crane and the gondola were run on the barge and stopped some place short of this bolted timber, didn't quite go that far?

A. Didn't go that far.

Q. About how far away did they stop the car?

A. About probably eight inches.

Q. Eight inches?

A. Yes, something like that.

Q. How far would the wheels be from the bolted timber?

A. Eight inches.

Q. About eight inches.

A. The lower part.

Q. How?

A. The lower part of the wheels on the track.

Q. Yes, about eight inches. Now was there

(Testimony of Harry Mortensen.)

anything put in between the wheels of that crane and the bolted timber?

A. Yes, sir.

Q. What was put in?

A. A timber six by eight or maybe eight by ten; I could not tell.

Q. What was it; a railroad tie?

A. A railroad tie, yes.

Q. What kind of a railroad tie was it?

A. Well, not square. It was six by eight or eight by ten. I could not tell you.

Q. Was it round on one side or two sides?

A. Not round. It was flat.

Q. Square?

A. Not square.

Q. Did it have square sides?

A. Square sides, yes, but not square.

Q. And that was shoved in between the wheel and the bolted timber?

A. Yes.

Q. There was only one timber bolted, was there?

A. One timber bolted.

Q. And how many ties did you use; how many loose ties did you use in the after end fastening or blocking the crane?

A. On the after end one.

Q. Just one; that was one tie; that was the

(Testimony of Harry Mortensen.)

only loose timber you used on that end in blocking the crane?

A. Yes.

Q. Over on the same end, the after end, on the outside tracks you used how many timbers? Let us say we take the starboar dside now; how many timbers did you use between the wheels and this bolted timber?

A. None as near as I can recollect.

Q. The wheels right up against the bolted timber?

A. Yes.

Q. And that was the same on the port side?

A. The same on the port side.

Q. Now how were those fastened on the opposite end of the barge?

A. With timbers; one timber across in front of the wheel trucks and then two timbers, one on each side, wedged in.

Q. One end resting on the deck, the other end—

MR. GORHAM: He didn't say on the deck.

A. One on the timber and one on the deck and then wedged in between.

THE COURT: I don't understand that.

Q. You had a timber across the rails?

A. Yes, one timber.

(Testimony of Harry Mortensen.)

Q. Lying on the rails?

A. Laying on the rails.

Q. And up against the wheels of the car?

A. Up against the wheels of the car.

Q. Now did you fasten any brakes?

A. No, sir.

Q. Who did?

A. The brakeman; the train crew.

Q. The train brakeman?

A. Well, the conductor.

Q. The conductor?

A. Yes.

Q. Did Mr. Nelson set any brakes?

A. Maybe he did. I could not tell you. He was always helping.

Q. Did Mr. Mikelson set any brakes?

A. Maybe he did. I could not tell you.

Q. You didn't set any brakes?

A. No.

Q. You didn't see any set, did you?

A. Yes, sir; I did.

Q. Who did you see set brakes?

A. The train men.

Q. You didn't see anybody but the train men?

A. No, I couldn't say that I did.

Q. What time of day was it?

A. It was in the afternoon between three and six; daylight.

(Testimony of Harry Mortensen.)

Q. When you left Potlatch on the morning of the 2nd, who was on watch?

A. We were all on watch at the time.

Q. Who was at the wheel?

A. The Captain.

Q. And what kind of weather was it when you left?

A. Fine weather.

Q. How long did the weather continue fine?

A. Until we reached Foulweather Bluff.

Q. Until you reached Foulweather Bluff and that is outside the canal?

A. That is outside.

Q. What time did you reach Foulweather Bluff?

A. Somewhere around the evening. I could not set the exact time. The early evening.

Q. You don't know what time it was then?

A. No, sir.

Q. It was after you had gone on watch?

A. Well, lots of times we are up between watches, too.

Q. Well, you were up at six o'clock that morning when you left?

A. Yes, sir.

Q. And how long did you stay up or did you go to bed again?

(Testimony of Harry Mortensen.)

A. I went to bed after everything was straightened out.

Q. That morning after everything was straightened out?

A. Yes.

Q. Now when did you get up again?

A. Twelve o'clock at noon.

Q. You got up at twelve o'clock noon?

A. Yes.

Q. And you were awake and up until the loss the next morning?

A. No, sir. I was up until six o'clock that evening.

Q. Up until six o'clock?

A. Yes, sir.

Q. And you turned in?

A. Turned in until twelve o'clock midnight.

Q. Twelve o'clock midnight you were up again?

A. Yes, sir.

Q. Now you had good weather up until you reached Foulweather Bluff and that was while you were on watch when you got to Foulweather Bluff?

A. No; the Captain was on watch.

Q. The Captain was on watch?

A. I might have been up at the same time. I can't remember.

(Testimony of Harry Mortensen.)

Q. But there was no bad weather prior to that time?

A. No.

Q. Everything rode along all right?

A. Everything fine.

Q. Do you know what time you passed Point No Point?

A. I was asleep. I didn't know.

Q. You think you had a thirty-five to forty mile wind—

A. Yes, sir.

Q. —at the time of the loss? How long had this wind continued at that speed or that velocity?

A. Thirty minutes; I think it was the strongest about thirty minutes.

Q. Before that it was good weather?

A. No, not good weather. There was a little wind blowing ten miles and twelve and thirteen; it was changing.

Q. Then this bad weather you are talking about existed for about thirty minutes before the loss?

A. It was 2:30, around 2:30 up to 3 o'clock was the heaviest wind.

Q. Well, was it eased off then at the time of the loss?

A. Yes, but a heavier sea was running.

Q. How was your tide?

(Testimony of Harry Mortensen.)

A. Flooding, against the wind.

Q. You came on at 12 o'clock midnight?

A. Yes, sir.

Q. Where were you then?

A, At Appletree Point, a half a mile off Appletree Point.

MR. COSGROVE: Have we got an easel?

(Conference between respective proctors and charts placed on easel.)

Q. How far is it, Mr. Mortensen, from Point No Point to Apple Cove Point; do you remember?

A. Between six and seven miles.

THE COURT: Appletree Point?

MR. COSGROVE: Apple Cove Point.

THE COURT: I thought he was talking about Appletree Point.

THE WITNESS: Appletree Point.

Q. You mean Apple Cove Point?

A. Apple Cove Point.

MR. GORHAM: There is Appletree Cove and Apple Cove Point.

Q. Did you call the Captain at any time during the heavy wind?

A. I was on my way to call him, but he came up at 2:30.

Q. Well, I thought you went to call him because you discovered the cars were gone?

(Testimony of Harry Mortensen.)

A. That was later on.

Q. Did he get up during this wind?

A. He got up at 2:30.

Q. Where was the cook?

A. Asleep.

Q. Did the Captain take the wheel—

A. No, sir.

Q. —in this terribly bad weather?

A. No, sir.

Q. You called him what time; 2:30?

A. I didn't call him. He came up. I was going to call him. He came up himself.

Q. How long did he stay up?

A. Probably fifteen minutes.

Q. And then went back to bed?

A. Went below again, yes.

Q. At that time the cars were still on board?

A. Yes, sir; everything looked natural.

Q. And everything looked all right?

A. Yes.

Q. You didn't think at that time there was any trouble coming?

A. No; we were proceeding slowly and—

THE COURT: Just when was this; 2:30?

THE WITNESS: 2:30 when the Captain was up.

Q. And the Captain went back to his berth?

(Testimony of Harry Mortensen.)

A. Fifteen minutes or so, a few minutes after, about fifteen minutes after.

Q. Did you keep any record of your weather and your time coming down on this voyage?

A. We always keep a log passing different points and the barometer readings and so on; we always do.

Q. If you get any weather does that appear in there?

A. I beg yardon?

Q. If you get any weather does that appear in the log book?

A. No, not always.

Q. You never put any weather in the log book. If you got an unusual wind would you put it in there?

A. I probably wouldn't. I don't say that the Captain didn't do that, but on my watch I never did so far.

Q. In your log book would you put down an unusual wind?

A. No.

Q. You would not put anything down?

A. No; just the barometer reading and the course and so on.

Q. Did you have a barometer on this boat?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. Are you sure?

A. Yes, sir.

Q. Did you put any barometer readings in the log book?

A. Yes, sir.

Q. On this voyage?

A. On that voyage; yes, sir.

Q. How do you recollect the time?

A. I don't recollect the time.

Q. How do you know that a wind came up at 2 o'clock or 2:30 or any other time?

A. I was right there.

Q. How do you know it was at that particular time?

A. We have a clock that strikes every half an hour.

Q. I know, but that was two years ago; how do you recollect?

A. I recollect.

Q. It is just a good recollection, just a good memory you have?

A. It is memory. It is facts.

Q. That is all you have got to stand on is your memory?

A. Memory, yes.

Q. And your memory is a good memory?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. And it is just as good about the blocking of these cars as it is about the time when the weather increased and fell away, just as good?

A. Practically; yes, sir.

Q. So we will turn it around now and your memory is just as good as to the weather as it is as to the blocking, is it?

A. Yes, sir.

MR. GORHAM: As it is to what?

MR. COSGROVE: As to the blocking. Will you produce the log book for us please.

(Mr. Gorham handed book to Mr. Cosgrove.)

Q. What is this book I hand you?

A. That is the log book, but I don't remember, I can't tell—

Q. What is it?

A. The log book of the ship.

Q. The log book of the Ketchikan II?

A. Yes, sir.

Q. Will you please turn to the log that was kept for February 2nd and 3rd, 1926?

A. There it is. (Handing.)

Q. Will you read the log?

A. This is not my writing. It is the Captain's writing.

Q. Can't you read his writing?

A. Oh, I could, but I would rather you would.

(Testimony of Harry Mortensen.)

Q. Well, will you please read it; read the log for the 2nd and 3rd.

A. Is that it; the second month, the second day, 6:10 A. M. left Potlatch with car barge No. 1 for Seattle.

Q. What next do you find?

A. Second and the third lost load; the second month, the third day, lost load at 3:50 A. M., about one and a quarter mile of Meadow Point.

Q. Is there anything else there in the—

A. Proceeded Seattle with the wrecked barge.

Q. Is there anything in there—

A. At moorings 8:15 A. M.

Q. Is there anything in there relative to the weather—

A. No, sir.

Q. —on either the day of the second or the third?

A. I don't see anything.

Q. You don't see anything?

A. No, sir.

Q. Is there anything in there showing a reading of a barometer on the second or the third?

A. No.

Q. You talked about reading a barometer?

A. At times; not all the time. I didn't state—

Q. Did you read the barometer once on the second or third?

(Testimony of Harry Mortensen.)

A. I don't recollect.

Q. You don't recollect?

A. No. It is natural I would, and seafaring men always do. The Captain he should keep the log book.

Q. When you are at the wheel aren't you supposed to keep the log?

A. Keep the log and state what time we pass certain points and so on. It is not always I write in the log book.

(Conference between respective proctors.)

MR. COSGROVE: It is agreed between counsel, if the Court please, that the log book shows the log book of the Ketchikan II for February 2nd and 3rd, 1926, as read by the witness and nothing else appears therein.

Q. Now the time of the loss you said was 3:30 in the morning?

A. 3:50 or 3:30.

(Conference between respective proctors.)

Q. How is that?

A. I said 3:30.

Q. You said 3:30?

A. Yes.

Q, At that time what was the condition of the sea?

(Testimony of Harry Mortensen.)

THE COURT: He says it was 3:30, but he is now changing his reading of the log, is that the way I understand it? The log, as I understand, reads 3:50.

MR. GORHAM: The log reads 3:50.

THE WITNESS: 3:50, when we proceeded to Seattle, Your Honor, with the barge after spilling the load.

Q. Well, without quarreling over the exact moment of the loss what was the condition of the sea at the time of the loss?

A. It was—the sea was heavy but the wind moderate.

Q. I am asking about the sea.

A. The sea was quite high.

Q. Was it choppy?

A. Choppy, yes.

Q. It was choppy?

A. Yes.

Q. Had it been choppy for any length of time?

A. It was getting worse after the wind went down, the sea was getting higher, going up against the tide.

Q. I refer now to this period just before the loss; not after the loss; the period before the loss; was the sea high then?

A. Yes, the sea was high.

(Testimony of Harry Mortensen.)

Q. It was high?

A. Yes.

Q. And was it choppy, rough?

A. Rough. Water come on board that boat all the time, on the tow boat, over the bow.

Q. The sea was not smooth, was it?

A. No, sir.

Q. When did you find a smooth sea after two o'clock in the morning?

A. I didn't find it until late after the loss of the scow.

Q. Until after you lost the scow?

A. Yes; we were getting in smoother water after we proceeded to the shore line.

Q. How long before the loss had the sea been choppy?

A. How long before the loss?

Q. Yes, how long before the cars went overboard had the sea been choppy?

A. I really don't know how you want me to answer that question.

Q. Well, had it been a half an hour or an hour or what period?

A. The sea was stronger after the wind went down, the sea was getting higher; the wind was at its highest at 2:30 and the sea getting higher after the wind went down.

(Testimony of Harry Mortensen.)

Q. I understand that is what you said a while ago, but you now say that the loss took place at 3:30. It does not make any difference whether it was at 3:30 or 3:50 so far as this question is concerned. How long before the loss or what period, what was the length of time before the loss that the sea was choppy?

A. Approximately two hours; an hour and a half; say an hour and a half.

Q. Well, that is from the time the bad weather started?

A. Yes.

Q. It continued choppy up until the time of the loss?

A. Yes, sir.

Q. There was no smooth sea during any of that time?

A. No.

Q. You are sure of that now?

A. I am sure.

Q. Absolutely sure?

A. Absolutely sure.

Q. There is no question in your mind?

A. No question in my mind.

Q. Did you sign any protest; do you recollect signing a protest?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. What kind of a wind did you have at the time of the loss?

A. A southerly wind.

Q. I will ask you to take a look at this document and see if that is your signature, that second signature?

A. That is mine.

Q. That is your signature?

A. Yes, sir.

Q. Dd you know what that document is?

A. Yes.

Q. What is it?

A. It is a statement.

Q. It is your protest, is it?

A. Protest or whatever you call it; I don't know.

MR. COSGROVE: We offer this in evidence.

THE COURT: Admitted.

MR. GORHAM: No objection.

MR. COSGROVE: Now I want to read what you said here over your signature.

THE COURT: What will that be?

THE CLERK: That will be Respondent's "A-3".

(Paper referred to admitted in evidence and marked Respondent's Exhibit "A-3".)

(Testimony of Harry Mortensen.)

Q. You just got through saying that the sea was choppy for a couple of hours before the loss?

A. I said an hour and a half.

Q. All right, an hour and a half, and there was no smooth sea?

A. No smooth sea.

Q. Now we will read this: "That after said tug with said barge in tow had been at sea about twenty-two hours, namely on the 3rd day of February, 1926, at the hour of about 3:50 o'clock A. M., and while said tug with said barge in tow was off Meadow Point about one and one-quarter to one and one-half miles, the tide then flooding and the sea then being smooth with a heavy swell running and a strong southerly wind prevailing, the said barge under the influence of wind and sea spilled her said cargo and said cargo became a total loss." Now which was right, now when you are testifying that there was no smooth sea or when you made this protest and said there was a smooth sea?

A. I don't understand what you are saying.

Q. Were you right now or right then?

A. I was right in this way: The wind was blowing and it could not be smooth at any time; the wind was blowing all the time from 1:30 to probably 3 o'clock and it could not be smooth.

Q. It could not be smooth?

(Testimony of Harry Mortensen.)

A. No, sir.

Q. Then that statement is wrong.

A. I don't understand it. It said the swell was running.

Q. You read it for yourself and see if you can find a smooth sea. (Handing.)

A. It could not possibly be smooth. There is an error there in that statement, there must be. The sea could not be smooth.

Q. Of course you know that was under oath; you swore to it at the time before Mr. Gorham here?

A. But still the swell was running—

Q. Just a minute. You swore to that at that time, didn't you?

A. The swell was running. It states right there the swell was still prevailing.

Q. You swore to that at that time, didn't you?

A. Yes.

Q. And you are swearing now, and both statements do not agree.

MR. COSGROVE: That was offered in evidence.

Q. (Continuing) Did you have any other books, record books of this boat carried on board that boat than this particular log book that we have in evidence here?

A. No, sir; I never seen any other.

(Testimony of Harry Mortensen.)

Q. Now how do you know, now tell me, how do you figure that at 3:30 this loss took place and that at 1:30 the breeze started and that at any particular time you were off Apple Cove Point; how can you remember those particular hours and parts of hours, fifteen minutes here and thirty minutes there past the hour; how can you remember that?

A. Well, I sure can remember it; it was impressed upon my memory so plain as anything that happened yesterday. You always when a man is in a perdicament like that you pay attention to know what he is doing and at that time after the loss in checking it all over impressed it on my memory so it is just as clear as if it happened to-day to me, the whole thing right after the time I got on watch to the time we proceeded to Seattle and tied up the barge.

Q. Why is it that you cannot remember who did the blocking and what you all did?

A. Well, we all helped together; no set piece of work for me or for the Captain; we all helped together.

Q. Where did these timbers come from that you used for blocking?

A. They all was on the barge, plenty of them.

Q. Where were they supplied; how did they come to be on the barge?

(Testimony of Harry Mortensen.)

A. They are continually used on the same with different cars and so on.

Q. How many sticks did you have available on the barge?

A. There is plenty at all times.

Q. I asked you how many?

A. I could not tell you the exact number.

Q. Well, twelve, fifteen or twenty?

A. Well, there is plenty. I could not tell you the exact number.

Q. Plenty is no answer at all. How many; was it ten?

A. I could not tell you.

Q. You are not sure you had ten, are you?

A. No, I would not say anything; I could not tell the number.

Q. You are not sure you had ten of them and yet you were using them right along, were you?

A. Yes.

Q. How long had you been running on this barge at the time of that loss; how long had you been working there?

A. On the boat or the barge?

Q. How long had you been working—

A. Two months altogether I was employed on the Ketchikan II.

Q. Yes, carrying cars on barges?

(Testimony of Harry Mortensen.)

A. Not always.

Q. Frequently?

A. Frequently, yes.

Q. And this barge always had these same sticks on her?

A. The same sticks on; lots of timse getting new ones.

Q. And you are not sure whether you had ten sticks on there at this time or not?

A. I am sure we had ten, but I could not tell you the exact number.

Q. What were they; ordinary railroad ties?

A. Different kinds.

Q. What were the other kinds that were not railroad ties?

A. Smaller ones and bigger ones, six by eight, eight by ten, ten by twelve and four by six, and two by six, all kinds of lumber always on board.

Q. That was furnished at Seattle, was it?

A. I don't know where. We get them any place we need them.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Mortensen, you say the crane and the gondola car were on the center track?

A. Yes.

(Testimony of Harry Mortensen.)

Q. Was the gondola car and the crane as long as the two cars on either side of it?

A. I could not tell you.

Q. You don't remember?

A. No.

Q. Was the crane after the gondola; was the crane in the stern or the gondola in the stern?

A. The crane was in the stern.

Q. They took it on the barge and spotted it?

A. Yes.

Q. Now do you remember how far from the bumper on the stern of the barge it was that they spotted the crane?

A. I could not exactly tell by inches, but I know it was blocked up in between there, whatever it be; probably six or eight or ten inches; I could not tell.

Q. Were there any fore and after ties between the bumper and the tie under the wheel of the crane?

A. I could not tell.

Q. You don't remember?

A. I don't remember; no, sir.

Q. What was the size of this bumper, do you remember, the dimensions?

A. About sixteen inches to eighteen inches high; I am not sure, but pretty near.

(Testimony of Harry Mortensen.)

Q. Was there anything in front of that bumper and lying on the deck—

A. No, sir.

Q. —any timber—

A. No, sir.

Q. —that you remember?

A. Not stationary.

Q. Was there any movable timber there?

A. No; put them afterwards for blocking, at any time we need them we put blocks.

Q. Was there a tie across the track under the wheels?

A. On the crane.

Q. On the crane?

A. Yes, sir; maybe two.

Q. At each end of the crane?

A. Each end.

Q. Each end of the crane?

A. Yes.

Q. Now take the gondola—Was there a tie under the wheels at the after most truck of the crane? Take the crane, was there a tie underneath the wheels or against the after wheels of the crane?

A. I don't understand the question.

Q. Well, you have got your crane and your gondola car in the center track?

A. Yes, sir.

(Testimony of Harry Mortensen.)

Q. And the crane was at the stern of the scow?

A. Yes.

Q. Now take the crane, was there any tie against the wheels on the after end of the crane across the track?

A. Yes, sir; we put blocking there.

Q. And was there any ties running between that tie across the track and the bumper?

A. I could not tell.

Q. You don't remember. Now take the outside track. There were two cars on each outside track, weren't there?

A. Yes.

Q. And they were spotted on the barge by the locomotive and the train crew?

A. Yes, sir.

Q. Was there any tie across the track against the rear wheels of each of these two rear cars?

A. No, sir; I don't think so.

Q. Nothing to block the wheels?

A. Only the bumper on the rear.

Q. Went right up against the bumper?

A. I am pretty near sure.

Q. And on the forward end were there ties across the track against the wheels?

A. Yes, sir.

Q. The forward end of all the cars—

(Testimony of Harry Mortensen.)

A. All the cars.

Q. —on the three tracks?

A. Yes, sir.

Q. And I understand you to say there were then ties put diagonally under the journals?

A. Yes, sir; and wedged.

Q. And wedged in?

A. Yes, sir.

Q. And how far were those forward trucks on those three tracks, the extreme end of each truck, how far weer those trucks from the stem of the barge?

A. About six feet; I am not sure, but between five and six feet; I won't be sure.

Q. You didn't set the brakes?

A. No, sir.

Q. The train crew set the brakes?

A. Yes, sir.

Q. Were the brakes first set by air or otherwise?

A. I could not tell you.

Q. Were the brakes ever set by hand to your knowledge?

A. Yes, sir; I seen them with a little stick on the wheels where they used that for a lever in setting them.

(Testimony of Harry Mortensen.)

Q. On how many cars did they set the brakes by hand?

A. They set all the cars with the wheel on top except that way with the lever, have a piece of iron or a piece of stick.

Q. Did they set the brakes on the gondola car that way?

A. Yes, sir.

THE COURT: We will interrupt the trial at this time and it will be resumed at 10 o'clock tomorrow morning and adjourn court until 10 o'clock tomorrow morning.

Further proceedings were continued to 10 o'clock A. M., December 28, 1927.

December 28, 1927, 10 o'clock A. M.

All present;

Proceedings resumed as follows:

THE COURT: You may proceed.

HARRY MORTENSEN, produced as a witness on behalf of the Libellants, resuming the stand, testified as follows:

REDIRECT EXAMINATION (Resumed).

BY MR. GORHAM:

Q. Mr. Mortensen, I understand there were three tracks on that barge?

A. Three tracks; yes, sir.

(Testimony of Harry Mortensen.)

Q. And there were two cars on the outside tracks and the crane and a car on the center track?

A. Yes, sir.

THE COURT: Two cars on each outside track?

MR. GORHAM: On each outside track. There were five cars altogether and the crane.

Q. I understand you to say that the cars on each track were five or six feet from the stem of the barge; is that right—

A. Yes, sir.

Q. —approximately?

A. Yes, sir.

Q. Had you ever acted as second on the Ketchikan when cars were loaded on that barge at Seattle bound for Potlatch?

A. Yes, sir.

Q. How many times approximately; more than once or twice?

A. Yes; four or five times; I could not say for sure.

Q. Referring to the 2nd day of February, 1926, when the cars and the crane that were lost were loaded on this barge at Potlatch, were they blocked that day on the 2nd of February in a manner similar to the blocking of cars on that barge leaving Seattle for Potlatch?

A. Yes, sir.

(Testimony of Harry Mortensen.)

MR. COSGROVE: Oh, I object, if the Court please, because the manner of blocking that day similar to any other day is not any test of sufficient blocking.

MR. GORHAM: It is not a question of sufficiency. It is a question of fact I am trying to find out. The Court will determine whether or not it is sufficient.

THE COURT: Objection overruled.

Q. What did I understand your answer?

A. In the usual manner of blocking leaving either Seattle or Potlatch, either place.

Q. In other words, the blocking that day leaving Potlatch was the usual manner of blocking that prevailed when the barge left Seattle with cars?

A. Yes, sir; practically the same.

MR. GORHAM: That is all.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. Was the crane blocked on this voyage in the usual manner in which you previously blocked cranes?

A. I never was employed while we handled a crane.

Q. You never saw a crane blocked before on a barge?

A. No, sir.

(Testimony of Harry Mortensen.)

Q. Do you remember when the crane was taken up to Potlatch?

A. No, sir.

Q. You were not on the barge when it was taken up?

A. No, sir.

Q. One more question about the wind. I think you said that at the time of the loss the wind was forty or forty-five miles an hour.

A. No, sir. From thirty-five to forty in my judgment.

Q. Thirty-five to forty?

A. Not at the time the barge was lost, but during the time—during the night, 2:30 and 3 o'clock A. M. on the 3rd day of—

Q. Between 2:30 and 3 o'clock it was how much?

A. Between thirty-five and forty; that is my judgment; now I could not say exact.

Q. What was it after 3 o'clock?

A. Moderating.

Q. Well, to what extent did it moderate after 3 o'clock?

A. I could not tell exactly.

Q. Well, haven't you got any estimate? You estimated the wind was thirty-five to forty miles between 2:30 and 3.

(Testimony of Harry Mortensen.)

A. It was a ten or twelve mile breeze after three o'clock; I could not say exact.

Q. A ten or twelve mile breeze after 3 o'clock?

A. Yes, sir.

Q. And it continued with moderation up to the time of the loss?

A. Yes, sir.

Q. How do you know it was thirty-five or forty; how do you get such an estimate as that?

A. By experience.

Q. What test do you have to determine—

A. I have no test only my own knowledge by being at sea at times and hearing other people talking and using my judgment and so on in different matters.

Q. Do you have any test at all? Were you in the pilot house—

A. Yes, sir.

Q. —at the wheel?

A. At the wheel.

Q. Do you consider that wind between 2:30 and 3 o'clock unusual?

A. I beg pardon.

Q. Do you consider that wind between 2:30 and 3 o'clock unusual for that time of year for that place?

A. No; early in the spring often times it happens we have the same kind of wind at times.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

ALEX FARMER, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. What is your full name?

A. Alex Farmer.

Q. What is your business, Mr. Farmer?

A. Engineer with the Kitsap Transportation Company.

Q. How long have you followed the sea?

A. Since I was nine years old.

Q. How old are you now?

A. Forty-two.

Q. Where have you followed the seas?

A. On the Atlantic, the Pacific and the Great Lakes.

Q. Steam and sail?

A. Steam and sail both.

Q. Were you Second on the motor tug Prosper in February, 1926?

A. No, the Tempest.

(Testimony of Alex Farmer.)

Q. And where were you then?

Q. I mean on the Tempest?

A. Yes, sir.

Q. On February 2nd were you bound on a voyage as Second on that vessel?

A. Yes.

Q. With tow?

A. Two scows of gravel.

Q. From where to where?

A. Devil's Head to Westlake.

Q. Where is Devil's Head?

A. Outside of Olympia.

Q. And where is Westlake?

A. Up in the canal, Lake Union.

Q. The Seattle Canal?

A. Seattle.

Q. What were your watches on that voyage?

A. 12 to 6.

Q. Coming from Olympia you came through the west passage?

A. The west pass, yes.

Q. Did you met with any casualty on the voyage?

A. A scow broke adrift; coupling lines broke.

Q. About what time and date?

A. 1:30 in the morning the 3rd of February, 1926.

(Testimony of Alex Farmer.)

A. Off of Blake Island.

Q. Off of Blake Island?

A. Yes, sir.

Q. That is just south of Wing Point, isn't it, what is called Wing Point on Bainbridge Island, a little south?

A. Down from Vashon Head.

MR. GORHAM: Just north of Vashon Head. It is not here on this chart.

THE COURT: You said 1:30 in the morning?

THE WITNESS: Yes, sir.

Q. What, if anything, did you do to correct the broken coupling?

A. A scow went on the beach and we had to take her off.

Q. The coupling what?

A. The coupling lines between the two scows.

Q. That had nothing to do with your tow line?

A. Nothing at all.

Q. Was the coupling repaired?

A. We had to put out one new coupling line.

Q. Did you proceed on your voyage after that?

A. Yes, sir.

Q. About how long were you on the beach there?

A. Until 3 o'clock in the morning.

(Testimony of Alex Farmer.)

Q. And then you left the beach at Blake Island on what side of Blake Island?

A. The south side.

Q. And came on to your destination?

A. Yes, sir.

Q. Entering the canal by way of Salmon Bay?

A. Yes, sir.

Q. What weather did you encounter crossing the Sound from Blake Island to Salmon Bay?

A. There was a heavy swell running all the way across.

Q. When did you arrive at Salmon Bay, if you remember?

A. I can't recollect the time when we got there.

Q. About how long would you be on that voyage approximately I mean?

A. About noon I guess.

Q. Leaving Blake Island at 3 o'clock you came right out into the Sound?

A. Right over towards Alki Point and then across the Bay.

Q. Now during that passage across there from 3 o'clock about how long did it take you to cross or how long would you be in the main body of water of Puget Sound there; you say until noon?

A. Yes; three hours I guess going across to Alki Point; that was the worst of it, going right across.

(Testimony of Alex Farmer.)

Q. Was there any wind blowing then?

A. It was not blowing near as hard as it was when the scow went on the beach, but there was a heavy swell running.

Q. What do you mean by a heavy swell?

A. Quite a sea.

Q. What was the tide?

A. Flood tide.

Q. What direction was the wind blowing?

A. Southerly wind.

Q. So your wind and tide were in opposite directions?

A. Yes, sir.

Q. What effect did that have on the sea?

A. Why, it raised the sea.

Q. What effect would the sea as it existed at the time, that is the sea at that time, what effect would that sea have upon a scow and tow?

A. You would have to put more pressure on the scow because she had that sea to buck.

Q. Running into the sea?

A. Coming into the sea.

Q. How do you remember this occasion?

A. Pardon.

Q. How do you remember that you ran into a storm on the night or the morning of the 3rd of February?

(Testimony of Alex Farmer.)

A. I have a pretty good memory or mind of things that have happened.

Q. You connect it up with the time that the barge went on the beach with a broken coupling?

A. Yes, sir.

Q. I show you a book and ask you what that is?

A. That is the log book of the Tempest.

Q. Now referring to the page numbered 30, printed number 30, what date is that?

A. February 2, 1926.

Q. And any other date on that page?

A. February 3rd and 4th.

Q. Now what is the item, entry on that log book February 3rd?

A. Wind increasing, barometer falling, February 2nd; February 3rd, No. 12 on the beach on the south side of Blake Island.

Q. What hour; any hour given there?

A. 1:30 A. M. broke coupling lines under way. Floated southerly. Wind rough. At 3 o'clock in the morning was under way.

Q. What is the next entry?

A. Arrived at Westlake Bunkers at 10 o'clock.

Q. Is that a true record?

A. That is the true record of the log book.

MR. COSGROVE: Did you make the entries?

THE WITNESS: Yes, sir, part of them.

(Testimony of Alex Farmer.)

MR. COSGROVE: Did you make those you read?

THE WITNESS: I made some write up and the Captain made the remainder there; while the scow was on the beach he entered that himself.

(Book handed to Mr. Cosgrove by Mr. Gorham.)

MR. COSGROVE: Are you through?

MR. GORHAM: Yes. I don't want to put that in evidence unless you want it. He read it.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How far is it from Blake Island to say Monroe Point?

MR. GORHAM: Where is Monroe Point?

MR. COSGROVE: About opposite Meadow Point.

Q. Do you know where Monroe Point is?

A. Not by that name, no.

Q. Do you know the point across from Meadow Point near Port Madison?

A. Yes, I know where that point is.

Q. Referring to that point as Monroe Point?

A. I have no idea what the distance is across there.

Q. How far is Blake Island from Restoration Point?

A. It is quite a long ways from Restoration

(Testimony of Alex Farmer.)

Point. It don't lie the same way as Restoration Point at all, not Blake Island.

Q. Blake Island is to the south of Bainbridge Island, is it not?

A. Blake Island lays right out of the mouth of West Pass.

Q. And it is to the south of Bainbridge Island, is it not?

A. Pretty near in line with Blake Island after you pass Restoration Point.

Q. Suppose you were going from, say, Monroe Point to Blake Island, you would travel fairly south to Restoration Point and then what course would you take?

A. If I was going I would go up past Restoration Point to Blake Island.

Q. Yes?

A. Right up the shore all the way.

Q. What course would you take after you rounded Restoration Point?

A. Straight for the island.

Q. Give me your direction, your compass course?

A. South I guess. I don't know the true course from Restoration Point to Blake Island.

MR. COSGROVE: We will have to get another map.

(Testimony of Alex Farmer.)

Q. How far was it from Blake Island to the mouth of Salmon Bay?

A. That is a thing that I don't know either. I never seen logged the distance.

Q. Haven't you any idea at all?

A. No; I never worked a rule on it to find out the distance.

Q. What time did you get to the locks on the 3rd?

A. We got off of Blake Island at 3 o'clock in the morning and was at Westlake at 10; we must have got there about 5 anyway, 5 or 6 o'clock; it is owing to how long you wait at the locks before you get through.

Q. You got there at 5 or 6 o'clock in the morning?

A. We didn't get there at 5 o'clock. We couldn't come across that quick from Blake Island to the locks.

Q. Let us find out when you did get there?

A. I could not give you the exact time when we got there.

Q. How long did it take you to go across from Blake Island to the locks?

A. I could not give you the definite time when we got there; it took us a little over three hours.

Q. It took you a little over three hours?

(Testimony of Alex Farmer.)

A. Possibly it did.

Q. Well, might it have taken you two hours and a half?

A. No, we couldn't make it over in two hours.

Q. You couldn't make it over in two hours.

A. No.

Q. How long would it take you to go over in fair weather, smooth weather with that load?

A. Well, it might be an hour and three quarters.

Q. Was this barge that you had an empty barge?

A. No; we had two loaded barges.

Q. You only had one barge when you got off the island, didn't you?

A. We had two when we got off the island; we had one on the tow line and one on the island.

Q. Now I understand you that you came from Olympia with two barges?

A. Yes, sir.

Q. Did each of them have cars on them?

A. They had no cars on whatever; they had sand and gravel.

Q. Both of them loaded with sand and gravel?

A. Both of them.

Q. Fully loaded?

A. Fully loaded.

(Testimony of Alex Farmer.)

Q. And one of them got away and went on the island?

A. Yes, sir.

Q. And at this time you say there was some weather when it went on the island?

A. Some weather; it was blowing.

Q. All right, it was blowing then, and while it was blowing you were able to handle this barge that had not gone adrift and go ashore and get the one that was there, bring them back and put them together and head for Seattle at three o'clock; that is what I understand you did.

A. Yes, we took the scow off and headed for Seattle.

Q. What did you do with the scow that did not go adrift—

A. Kept her on the line.

Q. —when you were pulling the other one off the beach?

A. We nosed the boat into the beach and got the scow off that was on the beach. The whole scow was not on the beach.

Q. But you were able to take her off?

A. We were able; we took her off.

Q. And the other scow did not go on the beach?

A. No, because the tail scow broke adrift, that is the reason she went on the beach; the other scow was in contact on her tow line.

(Testimony of Alex Farmer.)

Q. How long have you been at sea?

A. Since I was nine years old.

Q. Then you are accustomed to hauling barges around?

A. No, I am not accustomed to hauling barges.

Q. How long have you been engaged in the hauling of barges on Puget Sound?

A. About five years off and on, logs and scows.

Q. And I suppose you have met all different kinds of weather during that time?

A. Yes.

Q. Is the weather the same as a rule in February as it is in July?

A. No.

Q. What is the difference?

A. Well, it is fine weather in July, where you don't look for such fine weather in February.

Q. What kind of weather do you look for in February?

A. Well, you look for squally weather, blows, in February.

Q. Do you mean that you are liable to have a squall at any time or a blow at any time?

A. Well, I guess we are as far as that is concerned, I guess it can blow any time.

Q. You expect them?

(Testimony of Alex Farmer.)

A. Oh, it don't usually happen in July as it does in February.

Q. You expect them in February on Puget Sound?

A. Yes, we look for them.

Q. You expect them around Blake Island?

A. We expect them anywhere.

Q. You would expect them off Meadow Point, wouldn't you, in February?

A. I guess it would strike Meadow Point like any other place I guess.

Q. In fact you would expect it at any time in February all the way from Point No Point to Blake Island or to Olympia, wouldn't you?

A. It would strike anywhere; it don't purposely go and strike one place.

Q. Would you say that that squall or that blow that you had on this particular night was unusual for that time of the year?

A. I would not say that it was unusual, no.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Mr. Farmer, you know how far it is from the dock to Alki Point, don't you, approximately?

A. Four miles.

Q. Is it further from Alki Point to Blake

(Testimony of Alex Farmer.)

Island than it is from the dock at Seattle to Alki Point?

A. From Blake Island?

Q. Yes, from Blake Island across to Alki, is that a longer distace than it is across the bay?

A. Across the bay?

Q. Yes, than it is across the bay.

A. Yes.

Q. Do you know how far it is across from Alki Point to West Point approximately?

A. No. We used to make it with the Tempest running light in about forty minutes; that is running light.

Q. From Alki Point to West Point?

A. No; to Vashon Head.

Q. From Vashon Head?

A. That is right on the end of Vashon Island?

Q. To Alki Point or West Point?

A. Alki Point.

Q. How fast would your vessel go?

A. She used to travel about nine to ten.

Q. Nine or ten?

A. Yes.

Q. And how fast was she going over the ground on this night when you had these scows in tow?

A. We could not travel full speed with her because of the swell.

Q. Irrespective of the motion of your engines how fast were you going over the ground?

A. About four miles; three or four.

Q. Were you going that fast?

A. I believe we was. We could not pull her full because we were scared of breaking things to pieces, scared we could not force the scows into the weather.

Q. In going into the locks you had to go around West Point, did you?

A. Yes, sir.

Q. Did you understand the question; did you mean to testify that it only took you two hours to go from Blake Island up to West Point and around into the locks?

A. Oh, no; I say it took that from Blake Island to Alki Point, then we went across the bay to the locks; we ran right across the face of the bay towards West Point and then into the locks.

MR. GORHAM: Yes. That is all.

(Witness excused.)

WILLIAM HOWARD KAYLOR, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Captain.

A. William Howard Kaylor.

(Testimony of William Howard Kaylor.)

Q. What is your age?

A. Forty-three.

Q. What is your occupation?

A. A mariner.

Q. How long have you been a mariner?

A. 1900.

Q. In what waters have you—

A. Well, Puget Sound and adjacent island waters and southeastern Alaska.

Q. In what capacity?

A. Both in the engine room and in the deck department.

Q. In what capacity in the deck department?

A. Well, a Master in charge of the vessels for the last several years.

Q. What character of vessels?

A. Well, both gas, diesel and steam.

Q. You have a Master's license?

A. Yes, sir.

Q. How long have you had a Master's license?

A. I have had a Master's for about seven or eight years for steam.

Q. Are you a Master of a vessel at the present time?

A. No, sir, not right at the present time.

Q. Were you Master of a vessel on Puget Sound in February, 1926?

(Testimony of William Howard Kaylor.)

A. Yes, sir.

Q. What vessel?

A. The Prosper.

Q. What was she?

A. She was a steam tug.

Q. Who are her owners?

A. The Bellingham Tug & Barge.

Q. Was she in the towing trade in February?

A. Yes, sir.

Q. Were you on her as Master on the morning of February 3rd, 1926?

A. Yes, sir.

Q. Have you the log book?

A. Yes, sir.

Q. Where is the Prosper now?

A. The Prosper is in Petersburg, in the Wrangel Narrows.

Q. In Alaska?

A. Yes, sir.

Q. You sent for her log book?

A. Yes, sir.

Q. Do you have it in your possession?

A. Yes, sir.

Q. Did you make the entries in that log book on February 3, 1926?

A. I made part of them and the mate made part of them.

(Testimony of William Howard Kaylor.)

Q. Turn to the entries on February 3, 1926.

MR. COSGROVE: Let us find out where the Prosper was at that time.

MR. GORHAM: All right. Probably that would indicate.

Q. Where was the Prosper?

A. We was enroute from Bellingham to Seattle with a barge in tow leaving Bellingham on the afternoon of the 2nd.

Q. A loaded barge?

A. No; an empty barge.

Q. About how long a barge was it, the size; what was the length of it?

A. Oh, this barge was about a hundred foot barge; it was a good sized barge.

Q. How long a tow line did you have out?

A. We had about four hundred feet in the first part of the trip; along about the middle of the watch, about 2 o'clock in the morning of the 3rd, we lengthened the tow line about three hundred feet more?

Q. Why?

A. On account of the weather.

THE COURT: When did you make that change?

THE WITNESS: Along about between 2 and 3 I think.

(Testimony of William Howard Kaylor.)

THE COURT: In the morning?

THE WITNESS: In the morning of the 3rd.

Q. What were your watches?

A. My watch was from 6 to 12; the mate was from 12 to 6. Of course in charge of the vessel the person is not always off of watch at any time; he is off watch, but still he is on watch.

Q. Were you off at any time between 12 and 3 or 4 o'clock on the 3rd?

A. I was up a couple of times in that second watch.

MR. COSGROVE: You mean A. M.?

MR. GORHAM: A. M.; in the morning.

A. (Continuing) Yes; yes; after I had retired at midnight I was up.

Q. Where were you about 12 o'clock on the morning of the 3rd—that is midnight of February 2nd?

A. Past Point Wilson off Port Townsend just about midnight.

Q. Coming south?

A. I know we changed watches there.

Q. Coming south?

A. Yes.

Q. What was the weather there?

A. The weather was a little southeast I judge, about twenty miles. It was not anything strong at that time.

(Testimony of William Howard Kaylor.)

Q. What was the sea?

A. There was no sea to speak of there at all.

Q. Now did the wind increase or decrease or remain steady from then on?

A. Well, it was steady for the next hour and then it increased. I know that the rumble of the wind past my window aroused me, that is the reason that I got up.

Q. How much did it increase?

A. Well, I would say pretty near double.

Q. And how about the sea?

A. The sea increased some too.

Q. What was the tide after leaving Wilson?

A. We had the short flood.

Q. Now I wish you would look at your log book. Have you the log book there of the Prosper?

A. Yes, sir.

Q. —and read the entries from that log book of February 2nd and February 3rd and indicate which are the entries in your handwriting as you read them.

MR. COSGROVE: I suggest that he read his own entries.

A. We left Bellingham, left Kane & Grinshaw's Dock, that is the waterway, in Bellingham.

Q. What date?

A. February 2nd.

(Testimony of William Howard Kaylor.)

Q. What hour?

A. At 3:40 P. M. 15:40 I have it entered. With a scow, the Drummond 33. The barometer read 29.55. We proceeded south. Do you want each point?

Q. Yes, just give us the record; that is the best way.

A. At 15:43 municipal dock. Do you want the courses too?

Q. No; I am not—

A. 16:6 at the bell buoy. It was calm with a flood tide. At 17:25 Point Williams.

Q. That is the 17th hour, 25 minutes after the 17th hour?

A. Yes, 5:25 in the afternoon. A light northwest breeze. 17:57 Huckleberry. 18:05 Guemes Point; 18:25 Anacortes. 18:58 Shannon Point. 19:18 off Burrows Light. Barometer 29.40, with a strong southeast wind.

MR. COSGROVE: Where was that point?

THE WITNESS: Burrows Island.

MR. COSGROVE: Where is Burrows Island?

THE WITNESS: It is in Rosario Straits, about four miles the other side of Deception Pass. I was undecided at this time whether to go inside or out, but when I proceeded past there the weather was—there was no sea, so I went outside of Whidby

(Testimony of William Howard Kaylor.)

Island rather than go inside. It is a little bit shorter outside. I figured I could catch a fair tide from Point Partridge to Seattle. I figured on making Seattle about six in the morning. At 22 Point Partridge and then at 19 minutes past twelve Point —This is on February 3rd, the morning of the 3rd, the mate went on watch. Here this is his handwriting.—Point Wilson. The barometer—the tide was slack. The barometer reads 29.56. Strong southeast wind. 45 Admiralty Head—that is 45 minutes past 12. 1:23 Marrowstone Light.

MR. COSGROVE: What was that last number?

A. 1:23 in the morning Marrowstone Light with a flood tide. Barometer 29.57. Very strong southeast. 3:42 Bush Point.

Q. Where is Bush Point?

A. Bush Point is on Whidby Island about half way between Marrowstone Point and Point No Point; perhaps a little closer to No Point. The barometer reads 29.56.

Q. Point No Point is on the west side of the Sound?

A. Point No Point, yes, you pass on starboard. Barometer reads 29.56 at 3:42, southeast gale and rain.

Q. And where were you then?

(Testimony of William Howard Kaylor.)

A. At Bush Point. 5:07 Point No Point, barometer reading the same, the weather the same except for squalls. The weather was beginning to come in puffs at this time. Then the next is my handwriting at 6:10 Apple Cove Point. 7:45 West Point. 8:30 Duwamish Head.

Q. That is all; that is enough.

A. And 9:10 West Waterway.

Q. You say you were up twice in the night after you went below?

A. Yes, I got up and looked out the window and once I went up and slipped on my shoes and went on the after deck and looked around and they paid out the tow line.

Q. About what time was it those two times you were up?

A. It was right off Bush Point one time.

Q. And how was the weather and sea and wind conditions that you observed as compared with the entries made by the mate in the log at that time?

A. Well, I would have made them the same.

Q. What was the second time you were up; what time was the second time you were up?

A. I was up a little before that; I judge about 2 o'clock, before I got to Bush Point, and then off Bush Point. After that everything was all right and I didn't come up again until about 5:30 at the breakfast bell.

(Testimony of William Howard Kaylor.)

Q. How far is Bush Point from Meadow Point approximately?

A. Well, I would judge it is eighteen to twenty miles. Now that is just an estimate. I would not—

Q. So at Bush Point at three—

A. —forty-two.

Q. —3:42 it was—

A. Right here at Bush Point 3:42.

Q. —a southeast gale and rain. In your experience as a Master mariner in waters of Puget Sound would that condition prevail abreast of Meadow Point at that hour?

A. Yes.

Q. That wind, that velocity, and the sea as you saw it at Bush Point, what would be the—

.A I would figure that off Meadow Point it would be a heavy sea.

MR. GORHAM: I think that is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. How old is this Prosper?

A. Built in 1900, I think.

Q. And you say this was a lage barge you had?

A. I think that that is about a 500 ton barge. Of course that can be easily ascertained by the records.

Q. You have done considerable towing of barges, have you, Captain?

(Testimony of William Howard Kaylor.)

A. Yes, I have been with the company now for the last eight years in the general towing business and my first experience was in the cannery business with scows.

Q. You were up on the morning of the 3rd about 2 o'clock first and how long did you stay up then?

A. I didn't stay up long. I went out and they payed out some of the line, you see, and everything was all right. We had a light barge and a good able tug and so I lay down again.

Q. You didn't consider anything unusual there that would keep you up?

A. Not for us, no.

Q. And when you got up again at 3:42 you evidently did not consider it unusual for you because you returned to your bunk?

A. Yes. No; I figured that it was all safe for us, a good able tug and a light scow and a good tow line.

Q. You expect different weather, do you, in February from what you expect in July, Captain?

A. The weather as a rule is a little more unsettled and it seems as though in the winter time that the same velocity of wind will have more disturbance in the water than it will in the summer time. Now that may be imagination and it may not.

(Testimony of William Howard Kaylor.)

Q. You mean it will kick up more of a sea?

A. Yes.

Q. Make more of a swell?

A. Yes; it seems to have more force; the same velocity of wind.

Q. Now do you consider that this weather that you encountered on this voyage was unusual for that time of year?

A. The only unusual part of it was it came up and was of short duration. It was not bad before. And then it went down shortly after and when we came into Seattle the weather was fine, there was no sea.

Q. What I mean is, is what you encountered something to be unlooked for at that time of the year?

A. Well, I really did not expect it that night.

Q. Well, you are not quite answering my question. Is it—

A. Well, no. I think I understand what you mean, that it was no heavier sea than what a person would naturally expect at that time of year?

Q. That is what I mean.

A. No.

Q. Was the wind anything extraordinary for that time of the year?

A. Well, I have seen it blow that hard a good many times.

(Testimony of William Howard Kaylor.)

Q. At that time of the year?

A. Yes.

Q. When you take a barge out in February do you expect to meet with all kinds of weather?

A. A person has to take it as it comes.

Q. And you would not be surprised in February if you encountered this kind of weather and this kind of sea, would you?

A. No.

Q. You came through all right, did you not?

A. Oh, yes.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. What is the tonnage of the Prosper?

A. One hundred and eleven I think.

Q. Are you familiar with the Ketchikan II?

A. Yes, I have seen her.

Q. How does she compare in tonnage with the Ketchikan II approximately?

A. Well, she is a good deal more than twice the size I would judge.

Q. How?

A. I would think that she would be a little more than twice the size.

MR. COSGROVE: Twice the size.

THE COURT: Which way around is that?

(Testimony of William Howard Kaylor.)

THE WITNESS: What is that, Judge?

THE COURT: That is the Prosper is twice the size of the Ketchikan?

THE WITNESS: Yes, I think she is a little more then twice the size.

Q. And you were coming up with a light scow?

A. Yes.

Q. There is some difference in towing a light scow and a loaded scow in a storm, isn't there?

A. Yes.

Q. And in favor of the light scow as against the loaded scow, isn't it?

A. Well, yes; you havent that load there.

Q. Now when you say it was blowing a southeast gale at Bush Point what velocity of wind would that be; what would be a gale?

A. That would be in the neighborhood of forty miles.

MR. GORHAM: That is all.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. How would you estimate forty miles, Captain?

A. The only way we have of estimating that is in comparison and then get the weather reports. When we say forty miles that is only an estimate in our mind; we have no way of telling whether it is forty miles or whether it is fifty miles.

(Testimony of William Howard Kaylor.)

Q. Now in your experience would you say that if the wind at any given place on the Sound, say off Bush Point, should be, say, forty miles, would it follow that ten or fifteen miles away the wind would be the same?

A. No, sir.

Q. It does not follow.

A. You can't—I have seen it change considerably, but in this location the wind was coming from pretty near the same direction as off Meadow Point.

Q. Bush Point is beyond Point No Point, is it not?

A. Bush Point is right here. (Indicating.)

Q. And it is considerably to the west of Meadow Point, is it not?

A. Yes; that wind lay in kind of like this, you see, direction, we were facing pretty nearly into it and I would estimate for that reason that they were getting a pretty good sea in here.

MR. GORHAM: At Meadow Point?

THE WITNESS: Yes, off Meadow Point.

Q. That is your guess, isn't it?

A. That is my judgment, yes.

Q. You were twenty miles away from Meadow Point?

A. Yes; at 3:42 we was off Bush Point.

(Testimony of William Howard Kaylor.)

Q. Will you make another estimate of your distance from—

A. This gives it two knots right here; that is two, four, six, eight, ten, twelve, that is fourteen miles, fourteen knots.

MR. GORHAM: From where to where?

A. From Meadow Point to Bush Point. Now here this is not knots here. This is your standard knots or miles, that is your scale drawn there, right here. You see this gives it here to one, here is two, there is two right there, two, four, six, eight, ten, twelve, fourteen, sixteen, seventeen, nineteen knots, it is nineteen knots from Meadow Point to Bush Point.

Q. Yes, in an air line.

A. No; that is the course. I didn't measure it directly over it. That is by water.

Q. You have been at sea some time and have you observed winds in a distance but not yet touching you?

A. Yes, sir.

Q. And how close could you see the winds that were roughing the water and not yet touching you?

A. Well, the wind of course would touch us, but at sea five or ten miles away from us we could see or we could run into heavier sea than at this other point.

(Testimony of William Howard Kaylor.)

Q. Conditions might easily be different in five to ten miles apart—

A. Yes.

Q. —as far as the sea is concerned?

A. Yes.

Q. That same might be true also of the velocity and violence, strength of the wind?

A. Yes.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. But if the wind was blowing a southeast gale at Bush Point you would naturally expect that the same velocity obtained twenty miles south of Bush Point, the place from which the wind was blowing?

A. Yes.

MR. GORHAM: That is all.

A. (Continuing) We was facing nearly into the wind.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. How would you know it was blowing that twenty miles away? You could not be both places at once.

A. I wouldn't know it only just from general experience and judgment.

(Testimony of William Howard Kaylor.)

Q. What kind of experience have you had which would demonstrate that if you were off Bush Point and the wind was blowing forty miles an hour that at Meadow Point it would be blowing the same velocity?

A. Well, of course, I could not say that it was, but in my judgment I would think that it was.

Q. I say what experience have you had that would demonstrate that it was?

A. Well, just my general towing experience and in traveling from one place to the other and noticing the wind in our travels.

Q. Your guess might be wrong, might it not?

A. Oh, I might be wrong, yes.

MR. COSGROVE: Let us put this map in evidence here so that the Court can find out where Bush Point is. Is there any objection?

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: That will be Respondent's "A-4."

(Map referred to admitted in evidence and marked Respondent's Exhibit "A-4.")

MR. COSGROVE: Will you take a red pencil here and mark Bush Point so that the Judge can see it from where he sits; make a big "X" there.

(Witness marking.)

(Testimony of William Howard Kaylor.)

MR. COSGROVE: Now will you make a big "O" at Meadow Point so the Court can see the two on that chart?

(Witness marking.)

Q. The Sound at Bush Point seems to run north and south, does it not?

THE COURT: Is that Bush Point opposite some island?

THE WITNESS: Bush Point is on Whidby Island.

THE COURT: Meadow Point is still further up?

THE WITNESS: Yes.

MR. GORHAM: Here is Port Townsend, if the Court please.

THE COURT: All right.

Q. The Sound runs fairly north and south off Meadow Point, does it not, true north and south?

A. Yes.

Q. The channel?

A. The true course, of course, our compass, magnetic—

Q. Then when you get up to Whidby Island the channel swings off to the west, does it not?

A. Yes.

Q. When you get to Bush Point that is considerably to the West of Meadow Point, is it not?

A. Bush Point is west of Meadow Point.

MR. COSGROVE: That is all.

MR. GORHAM: That is all.

(Witness excused.)

J. C. BROWNFIELD, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. Your full name, Captain?

A. J. C. Brownfield.

Q. Your occupation?

A Manager of the Washington Tug & Barge Company.

Q. Are you a Master mariner?

A. Yes, sir.

Q. How long have you been a Master mariner?

A. Since 1904.

Q. And you have a Master's papers?

A. Yes, sir.

Q. What tonnage?

A. Unlimited.

Q. What waters?

A. Any ocean.

Q. Sail and steam?

A. No; steam only.

Q. How long have you been in the tug boat business?

(Testimony of J. C. Brownfield.)

A. Oh, about fifteen years.

Q. Have you ever been Master of tugs?

A. Yes, sir.

Q. What size tugs, tonnage?

A. I have been from four or five tons up to the largest.

Q. On Puget Sound?

A. On the coast.

Q. What would be the tonnage of the largest, oh, approximately?

A. Six hundred tons.

Q. How long were you Master of tugs towing on Puget Sound?

A. Oh, probably six years.

Q. In all waters of Puget Sound?

A. Yes, sir, Puget Sound and Alaska and along the coast.

Q. Are you familiar with the tug Ketchikan; have you seen her?

A. In a general way, yes.

Q. You have seen the craft?

A. Yes, I have seen the craft.

Q. A motor tug?

A. Yes.

Q. You know the Chesley No. 1 car barge; you have seen it?

A. I know the car barge that he has.

(Testimony of J. C. Brownfield.)

Q. The ninety-foot car barge?

A. Yes.

Q. If the Ketchikan II was towing the Chesley car barge No. 1 ladened with five cars and a locomotive crane on its own wheels with four of the railway cars loaded with contractor's camp equipment for cargo, crossing the Sound from President Point toward Meadow Point in a storm with a sea running, what would be the action of the wind and waves on the tow, such a tow in such conditions?

MR. COSGROVE: I object unless there be a better definition of the term "storm." That is a little too broad and too indefinite.

THE COURT: Objection overruled.

A. Well, that would depend of course largely on the force of the wind and sea.

Q. Yes. Supposing you had a wind blowing, assuming that the wind was southeast or southerly, at the hour ending at eleven o'clock p. m. on February 2, 1926, at 18 miles; the hour ending at midnight, 13 miles; the hour ending at 1 a. m. on the morning of the 3rd of February, 19 miles; the hour ending at 2 a. m., 28 miles; the hour ending at 3 a. m., 26 miles; the hour ending at 4 a. m., 22 miles, and assuming that for five minutes beginning at 1:35 a. m. of the 3rd the wind blew at the rate of

(Testimony of J. C. Brownfield.)

36 miles and in the five minutes beginning at 2:10 a. m. of the 3rd at the rate of 34 miles an hour.

MR. COSGROVE: I object to the question for the reason that there is no testimony that there was any such set of facts affecting this vessel and there is no testimony that that was the wind at any time or point in her movement.

THE COURT: Objection overruled.

MR. COSGROVE: An exception.

THE COURT: Allowed.

A. Where was this data gathered?

Q. This data from the anemometer on the top of the Hogue Building at Seattle.

A. Well, the weather condition might be considerably different out in that locality.

Q. Assuming that the weather conditions were the same in that locality, what would be the action of that wind and sea or what would be the action of the wind and the sea and the force of the wind upon the tow?

A. Do you know what speed the tug was making?

Q. No, I do not. The tide was flooding about an hour flood.

THE COURT: Didn't he testify it would make one mile over the ground?

MR. GORHAM: I have forgotten, if the Court

(Testimony of J. C. Brownfield.)

please, what the testimony was in respect to that. I don't think the witness testified. Mr. Mortensen, did you testify the speed you went into that storm from President Point, how fast you were traveling over the land?

MR. MORTENSEN: A mile an hour approximately.

MR. GORHAM: Approximately a mile an hour.

MR. COSGROVE: Let us get that witness back here again if you are going to interrogate him.

MR. GORHAM: Well, I simply asked him the question because the Court inquired, that was all.

THE COURT: That is the way I remembered his testimony.

MR. GORHAM: Yes, I had forgotten it, if the Court please.

A. I would think under those conditions that that barge, loaded in that manner, in the tow of that tug, would have a tendency to head up in the wind and then fall off in the trough of the sea and then probably go along for a while in that condition and eventually sheer and then come up into the wind and fall off in the trough of the sea on the other side.

Q. With a tow line four hundred feet long the same condition it would be?

A. Oh, yes, four or five hundred feet.

(Testimony of J. C. Brownfield.)

MR. GORHAM: I forgot to put that in.

Q. Now in towing with a tow line under those conditions your tow would not follow immediately the tug along a given line?

A. No, if the tug did not have any more power than to pull her through the water at that rate of speed, I would say that the barge would sheer off first on one side and then on the other.

Q. In sheering off a line drawn fore and aft through the center of the barge would not be along a line extended through the center of the tug fore and aft or parallel to the line of the center of the tug fore and aft, would it?

A. Oh, no; sometimes they go off to right angles if a squall strikes them, an extra hard squall.

Q. And if you have got those conditions of wind and sea and of tug and tow what effect will the sheering of the barge have upon the cargo, if any?

A. Pardon?

Q. What effect will that sheering have upon the cargo, if any, on the barge?

A. What effect will the sheering of the barge have upon the tug?

Q. No; what effect will the sheering of the barge have upon the cargo, if any?

A. Well, when the barge is heading up into

(Testimony of J. C. Brownfield.)

the sea, going at that low rate of speed, in that locality, it would be practically no effect at all on the cargo on the barge because the barge would be comparatively steady.

Q. Just a moment. Let us put into our assumption or hypothetical question the fact that the barge was a foot down by the stern.

A. Well, the fact that she would be down by the stern and up by the bow would in a heavy wind storm at sea and going at that rate of speed would accentuate her liability to sheer into the trough of the sea. Had she been loaded down by the head, well down by the head, then it would have been a much easier job to have held her up into the sea, and of course when the barge falls off in the trough of the sea then the beam of the barge is in such small proportion to the length of the barge that a comparatively small sea will cause them to roll.

Q. This barge was ninety feet long and thirty-six feet beam; she would roll in that kind of a sea under that force of wind?

A. Yes, I would think so; that is, she probably would not do much rolling to the weather because the cars on the barge, that top weight, would act a good deal like the sails on a ship, she would probably come up to about an upright position and then roll down to leeward.

MR. GORHAM: I think that is all.

(Testimony of J. C. Brownfield.)

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. I think you just answered one of Mr. Gorham's latest questions relating to the cargo by saying that this sheering ought not to have had any effect on the cargo, if I understood you correctly.

A. Will you speak a little louder, please?

Q. Mr. Gorham asked you some questions about the effect of this sheering on the cargo and, if I understood you correctly, you said that that ought not to make any difference.

MR. GORHAM: No, I didn't so understand him.

A. As long as the barge is heading up into the sea, she is ninety feet long and going at that slow rate of speed, she would be steady, would be comparatively steady; when she fell off into the trough of the sea of course she would roll.

Q. Now what course did you have in mind when you were answering these questions; what course was this tow and tug on?

A. I understood that they were coming up the Sound, coming from President Point to Meadow Point.

Q. Well, your understanding is that they were then on a course from President Point to Meadow Point?

(Testimony of J. C. Brownfield.)

A. Yes, I understood the counsel to state that.

Q. That would be a course crosswise of the Sound, would it not, Captain?

A. It would be a diagonal course across there, yes.

Q. And such a course would be diagonal to a southerly wind, would it not?

A. Yes.

Q. But let us suppose that the course is southerly instead of southeasterly or diagonal and the wind is from the south?

A. It would not alter the situation very much, as I see it, because that barge was astern of the tug like a kite on a string, it is blowing down to leeward and it would not make very much difference what course the tug was on as long as the tug was heading up to windward of the barge; the barge would drift down to leeward of the tug boat no difference what course the tug was on.

Q. I think you said something about the barge sheering from side to side and coming up into the wind and by that you mean meeting the wind as it comes forward?

A. Yes, that would be meeting the wind.

Q. And then falling off into the trough of the sea, I believe that is what you said, wasn't it; it

(Testimony of J. C. Brownfield.)

would be alternating, coming up and falling off into the trough?

A. Yes, it would fall off into the trough of the sea until such time as the hawser set tight and broke that sheer then she would come up to the wind and in all probability fall off on the other side or she might not quite make it up in the wind and fall back off on the same side again.

THE COURT: There has been evidence as to having a bridle on the front of the barge. Would that in any way tend to counteract that?

THE WITNESS: That would not overcome that tendency under those weather conditions. Of course if the tug and barge were moving through the water at a fair rate of speed when the tug has sufficient power it exercises sufficient power on the barge to overcome the effect of the wind. The bridle then of course functions perfectly, but under those conditions, when you are almost stopped, the bridle will not hold her steady.

Q. Suppose we change the hypothetical question a little and make the movement of the tug and tow over the ground two miles instead of one.

A. Pardon?

Q. Suppose we change this hypothetical question of Mr. Gorham's, showing the speed over the ground from one mile to two miles—we will just

(Testimony of J. C. Brownfield.)

double it—what would your answer be then?

A. The more speed you had, why, of course, the greater tendency of the barge to tow straight.

Q. Well, if this tug and tow were meeting this weather going over the ground at the rate of two miles, would you feel that there was any distinct liability to sheer to one side or the other?

A. Well, two miles is not very fast, you know. That is going pretty—

Q. You really are not answering my question yet. Do you think there would be any distinct liability to sheer from side to side at two miles?

A. Oh, I think so, yes, there would be more or less sheering at two miles an hour.

Q. Well, would there be any particular difference between two miles and one mile?

A. Oh, yes, yes. One mile you would get more sheering and she would hold her sheer longer at one mile than she would at two.

Q. There would be a distinct difference between two and one, would there?

A. Oh, there would be some little difference.

Q. Do you expect in February, Captain, any different weather from what you get in July?

A. Oh, yes.

Q. In what respect is it different?

MR. GORHAM: This is not proper cross

(Testimony of J. C. Brownfield.)

examination, if the Court please. We object to it on that ground.

THE COURT: Objection oberruled.

A. In the month of February you have more wind and more rain, more severe weather.

Q. With reference now to Puget Sound, particularly from Point No Point down to Meadow Point?

A. The weather conditions of course would be the same with regard to that.

Q. You would expect more wind and more what?

A. There would be more wind and more rain in the month of February than there would be in the month of July.

Q. Do you expect any squally weather in February?

A. Oh, yes, very liable to get it.

Q. What are you liable to get by way of bad weather in February in that vicinity?

A. Liable to get anything from a dead calm to a whole gale.

Q. What would a whole gale be?

A. Oh, it would be a storm probably fifty to sixty miles an hour.

Q. Then would you say that this wind which counsel named in the hypothetical question was

(Testimony of J. C. Brownfield.)
unusual for the month of February in that particular portion of Puget Sound?

A. Well, of course, we don't have that kind of weather continuously, but then you could reasonably expect such a wind.

Q. You could reasonably expect such a wind in the month of February?

A. Yes.

Q. And could you reasonably expect that kind of a sea in the month of February at that vicinity?

A. Oh, yes, the sea would naturally follow the wind.

Q. Now, Captain, since you quite clearly are familiar with Puget Sound and know the winds and waves, I want to ask you a question. We will change the hypothetical question a little bit and we will suppose that in this vicinity there was a heavy swell running and a strong southerly wind prevailing, the sea being smooth, would you consider that—

A. State that first part again.

Q. The tide is flooding, a heavy swell running, strong southerly wind prevailing and the sea smooth, what effect, if any, would that have upon the barge?

A. How could you have a strong southerly wind and a heavy swell and a smooth sea?

Q. You don't think it could happen?

A. It seems to me that is rather a contradictory statement.

(Testimony of J. C. Brownfield.)

Q. You can't picture that from your experience?

A. No, not unless it was covered with oil.

Q. If the sea is smooth, Captain, there is no trough to fall into, is there?

A. No.

Q. Not even with a heavy swell running there is no trough, is there?

A. Well, if there is a heavy swell there is a trough, surely.

THE COURT: The question is a trough to fall into.

Q. I am talking about a trough to fall into. You spoke of a trough a while ago.

A. If there is a heavy swell, of course, there is the trough of the swell.

Q. But that was not the trough you referred to a bit ago in answer to Mr. Gorham's question; you were talking of a different trough, weren't you?

A. You take a heavy swell and a sea and a wind—with a wind I think would be the same thing. I could not imagine—

Q. Do you get a swell simultaneously with a wind?

A. Yes, you get it very quickly on the inland waters; the wind comes and the sea comes up; when the wind goes down the sea generally follows.

Q. The sea follows wind, does it not?

(Testimony of J. C. Brownfield.)

A. Yes, the sea follows the wind.

Q. And it does not come up at the same time?

A. On inland waters it starts practically at the same time; it is not required to blow very long until you have a sea.

Q. Counsel in his hypothetical question referred to a five minute wind out at this particular place off Meadow Point at thirty-six miles an hour; would you consider that a wind, a five minute breeze at thirty-six miles an hour?

A. Well, I would consider that—what was the wind previous to that five minutes?

Q. I don't know. It was under thirty miles.

A. Of course that would be regarded as a squall.

Q. That is a sort of a puff, is it not?

A. It is a squall, it would be designated as I think.

Q. A squall might happen at one point on the Sound and not affect another point ten miles away, might it not?

A. Yes, that is true.

Q. So that if you had a squall at any given point it would not follow that it was at any other point ten miles away?

A. No, no; the only thing is that you generally get more wind out on the water, out on the channels of the Sound, than you do at a weather station;

(Testimony of J. C. Brownfield.)

you are more liable to get squalls out there than you are at the weather station in Seattle.

Q. The weather down on the water would be quite different or quite less, would it not, than the weather up 250 feet above Second Avenue and Cherry?

A. Well, my experience with the weather in that locality has been that whenever it is blowing in around the city and around the bay it is much stronger outside, you get out around West Point and you have got a breeze and got a sea running; you get in the bay, of course, you don't have the sea; you would not expect that, but very often you get very little wind. I have come up outside, come up the Sound, come into the bay and come into the office and reported a heavy gale of wind all the way up the Sound and the fellows in the office would hardly believe me, they would say, "It has been calm here; we haven't had any wind here to bother us."

Q. Well, you have seen the reverse of that, too, haven't you, Captain?

A. Oh, when it is the reverse it is generally rain squalls or something like that around the city, but any general wind my experience has been that it is more severe out in the main channels of the Sound than it is around the bay.

(Testimony of J. C. Brownfield.)

Q. But you have seen it the reverse?

A. Yes, I have seen squalls around the city and then get outside and it would be comparatively calm, but that is not the rule.

Q. Suppose you had a wind off Apple Cove Point of thirty, thirty-five or forty miles an hour from the south running for an hour, say, blowing for an hour, how soon would the sea die down to smooth water?

A. If it would just fall flat calm do you mean?

Q. How soon would it go down to a smooth sea?

A. If the wind would just let go, just quit blowing, I imagine that probably within a matter of thirty or forty minutes there would be very little sea left.

Q. Say you had a wind running for two hours, such as that, blowing straight up the Sound or down the Sound?

A. That same condition holds good, if the wind would fall flat calm the sea would very quickly go down.

Q. But if it did not fall flat; if it just broke off gently?

A. Then, of course, the sea would run longer.

Q. The sea will run after the wind, will it not?

A. What is that?

(Testimony of J. C. Brownfield.)

Q. The sea will continue to run after the wind is gone, will it not?

A. Yes, it will run for a certain length of time, but not very long on inland waters. Outside, out in the ocean it will last a long time, sometimes for a couple of days after a severe storm, but on inland water that is not the case, the sea will come up quickly with the wind and it will calm down quickly after the wind is gone.

Q. You don't call a ten mile breeze a wind, do you?

A. A ten mile breeze?

Q. Yes.

A. No; that is just a moderate breeze.

Q. Would that ten mile breeze make any sea?

A. Not much.

Q. Would it make any?

A. Oh, a little, a little ripple.

Q. Suppose the breeze had been thirty, thirty-five or forty miles for a couple of hours, then it would change off to ten miles an hour, would you say that that would produce a smooth sea?

A. Yes, it would! the sea would eventually go down, it would soon go down.

Q. Well, as long as it was still going ten miles an hour would it be a smooth sea?

A. Well, of course it would reduce down to

(Testimony of J. C. Brownfield.)

whatever a ten miles breeze would hold. A ten mile wind would not make much sea, you know.

Q. Well, would it be a smooth sea?

A. Oh, practically so. Of course it is a relative proposition. If you were out there in a canoe it would mean one thing and if you were out there in a large vessel it would mean something else.

Q. If there was a swell running would there be a smooth sea?

A. Well, I don't quite get that. As I visualize a smooth sea it is something where the water is on a perfect level. If there is movement there, regardless of whether it is a swell or a sea, it is not smooth.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. I understand, Captain, you to say from your experience that the wind blows stronger through the courses of the Sound than it does over the land.

A. Yes, sir, that has been my experience.

Q. Do you draw from that experience that the storm center follows the channel of the Sound as it is made by the contour of the land on either side?

A. Yes, that seems to be the rule. You not only find it on the Sound here but wherever you go. Take, for instance, the Columbia River, the westerly winds will blow a gale up the Columbia River and

you get a few miles away from the river and you have but very little wind.

MR. GORHOM: I think that is all.

MR. COSGROVE: That is all.

(Witness excused.)

ARTHUR W. NELSON, called as a witness on behalf of the Libellants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. GORHAM:

Q. State your full name, Captain.

A. Arthur W. Nelson.

Q. Speak loud, Captain, so we can all hear you. What is your occupation?

A. Operator of a tow boat.

Q. On Puget Sound?

A. On Puget Sound.

Q. How long have you followed the sea?

A. Thirty-one years.

Q. What waters?

A. Atlantic and the Pacific.

Q. What vessels; sail and steam?

A. Sail and steam, gas and diesel.

Q. Have you sailed on the seas?

A. Yes, sir.

Q. As a sailor?

A. A sailor.

(Testimony of Arthur W. Nelson.)

Q. How long have you operated gas boats on Puget Sound?

A. The first of 1906.

Q. Were those gas boats tug boats?

A. No; that happened to be a pure seine fishing boat.

Q. How long have you operated, if at all, what you call motor tug boats?

A. 1911.

Q. Since 1911 on the waters of Puget Sound?

A. Yes, sir.

Q. Towing what?

A. Towing barges and logs.

Q. Were you the operator of the motor tug boat Ketchikan II on February 2nd and 3rd, 1926?

A. Yse.

Q. When had you joined that vessel as its operator?

A. About—I first went aboard the vessel in July, 1923. I think it was. Captain Croft was the owner of the vessel then.

Q. How is that?

A. Captain Croft was the owner of the vessel then.

Q. Were you the operator of the Ketchikan II with the Chesley No. 1 car barge laden with railway

(Testimony of Arthur W. Nelson.)

cars and a locomotive crane in tow from Potlatch to Seattle on February 2nd and 3rd?

A. Yes.

Q. What were your watches on that voyage?

A. From 6 to 12, but as an operator subject to call at any time in any unusual conditions.

Q. What time did you leave Potlatch on that voyage?

A. I think it was somewhere around 6 or 6:30 or 5:30. I forgot now exactly.

Q. In the morning?

A. In the morning.

Q. Of the 2nd?

A. Yes.

Q. And where had you arrived en route at midnight on the 2nd?

A. Oh, I should judge about in the neighborhood of a half a mile northwest of Apple Cove Point.

Q. You went off watch then?

A. Yes.

Q. What was the weather at 12 o'clock when you went below at midnight of the 2nd?

A. Oh, I would judge it was nothing to be alarmed over, a breeze about, oh, from eight to twelve or fourteen miles, between there.

Q. Did you go immediately below at midnight?

(Testimony of Arthur W. Nelson.)

A. Well, I usually about ten to fifteen minutes after twelve.

Q. When did you come on deck again that morning?

A. That morning about it must have been in the neighborhood of pretty close to two o'clock or somewhere around there.

Q. What called you at two o'clock?

A. It got rough. The boat began to—the tug began to rock.

Q. Did anybody call you or did you come up on your own initiative?

A. I as a rule get up myself, but if I ain't mistaken they called me at this time.

MR. COSGROVE: I didn't get the answer to that. What was that, Mr. Reporter?

(Answer read.)

Q. Did you go on deck?

A. Yes.

Q. What was the weather condition then?

A. Well, it picked up a heavy wind.

Q. And what was the sea condition?

A. The sea was—well, the sea was picking up. There was a little sea before from this breeze what we had, but it began to get heavy.

Q. How long did you remain up at 2 o'clock?

A. I was up for about an hour.

(Testimony of Arthur W. Nelson.)

Q. Did the wind and sea increase or remain steady or decrease in force and velocity?

A. Before I went—laid down again the wind decreased.

THE COURT: Before you laid down it began to fall?

THE WITNESS: Yes.

Q. Began to increase or decrease?

A. Decrease.

Q. That is before 3 o'clock?

A. Yes.

Q. You went below again at 3 o'clock?

A. Yes, about that.

Q. How about the sea?

A. Well, there was quite a swell.

Q. How?

A. Quite a swell rolling, big swell.

Q. Did that increase or decrease?

A. It seemed like the tide was flooding, increased slow.

Q. The tide was flooding, was it?

A. Yes.

Q. Did you look back at your tow?

A. Yes.

Q. How was the tow riding?

A. Normally the same as it was when I left the canal.

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: What time do you refer to?

MR. GORHAM: When he was up at 2 o'clock.

Q. That is, during that hour how many times did you look after and observe the tow?

A. I looked quite often during the wind.

Q. Before you went below did you see any change in the condition of the tow riding—

A. No.

Q. —from normal?

A. No.

Q. When did you next come on deck?

A. About, oh, it must have been between 3:30 and 3:45.

Q. What brought you on deck—

A. Between 3:30 and 4 o'clock.

Q. What brought you on deck that time?

A. My Second lifted the governor, took the power off the engine, and I jumped out from my bunk to see what he was doing.

Q. You could feel something?

A. No.

Q. Or hear something?

A. No.

Q. How—

A. By the motion of the engine.

Q. Did the motion of the engine change?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Slowed down?

A. When he lifted the governor, yes, it slowed down.

Q. That aroused you?

A. Yes.

Q. Did you come up then?

A. Yes.

Q. Where did you go; up on deck?

A. Up on deck, yes.

Q. What did you find when you went on deck?

A. The first thing Mr. Mortensen said, "I can see no lights," and I looked back, I saw a dark shadow on the water and I said, "Well, it seems like the scow is standing on end."

Q. Then tell us just what you saw there; continue.

A. Well, I didn't see nothing else at that time.

Q. Did she resume her normal position in the water?

A. Before that?

Q. No; after you saw her standing on end. You say you saw her standing on end.

A. Yes. I didn't see no light either. I just saw a dark shadow like.

Q. When you saw the scow she was standing on end. Did she continue to stand on end?

A. No.

(Testimony of Arthur W. Nelson.)

Q. After you saw her standing on end what did you see?

A. Nothing on the scow.

Q. She had spilled her load?

A. Yes.

Q. You continued—

A. I took my position as close as I could observe.

Q. What was your position then?

A. I was I would judge a mile and a quarter to a mile and a half northwest of Meadow Point.

Q. How could you determine that position?

A. Just by judgment and I saw the Alki light just in line with West Point Bluff.

THE COURT: We will interrupt the trial and will resume again at 2 o'clock. The Court will be at recess until 2 o'clock.

Further proceedings continued to 2 o'clock p. m., same day.

December 28, 1927, 2 o'clock p. m.

All present.

Proceedings resumed as follows:

ARTHUR W. NELSON, a witness on behalf of the Libellants, resuming the stand, testified as follows:

MR. GORHAM: Read the last two questions and answers.

(Testimony of Arthur W. Nelson.)

(Questions and answers read.)

MR. GORHAM: That is all.

CROSS EXAMINATION.

BY MR. COSGROVE:

Q. Do you hold a license from the Steamboat Inspection Service?

A. No.

Q. Have you ever had one?

A. No.

MR. GORHAM: May I interrupt just a moment? Well, go ahead. I will ask him later.

Q. Let us begin now with your voyage at Potlatch, the beginning of the voyage, and go down to the point of loss, giving the weather. What was the weather when you left Potlatch?

A. Well, it was what I call fair with very little breeze.

Q. What is that?

A. It is what I would call fair conditions.

Q. And you left there at 6 o'clock in the morning?

A. About.

Q. And how long did it continue fair?

A. Well, there was—when I was abreast of Gamble there was hardly any wind at all; what little there was was from the south or southeast.

Q. Just a moment. All the way then from

(Testimony of Arthur W. Nelson.)

Potlatch to abreast of Gamble you had fair weather?

A. Yes, with light breeze coming down the canal.

Q. All right. Now go on, from Gamble what was your weather?

A. Well—

Q. By the way, what time did you get abreast of Gamble?

A. About 4:30 in the afternoon.

Q. What was your weather after leaving the point off Gamble, West Gamble?

A. Well, I come around Foulweather about a little after five, I could not just exactly say, but a little after five in the evening, about five, and there was a light southeasterly wind, apparently southeasterly along the shore from Foulweather to No Point.

Q. A little southeasterly?

A. Yes, apparently southeasterly; it may have been southerly; I could not say because it will follow the shore; southerly or southeasterly.

Q. From Gamble to—

A. No; from No Point to Foulweather—from Foulweather to No Point.

Q. Now from Gamble from 4:30 to 5 o'clock what kind of weather did you have?

A. It was a little southerly or southeast, just a little breeze.

(Testimony of Arthur W. Nelson.)

Q. And at 5 o'clock where were you?

A. In the neighborhood of around Foulweather Bluff.

Q. Now what was the weather after leaving Foulweather Bluff?

A. I just said a light southeasterly or southerly.

Q. Until what time?

A. No Point; well, it continued as far as I was on shift until 12 o'clock.

Q. It continued that way until 12 o'clock?

A. Yes.

Q. You had a light breeze until 12 o'clock?

A. Well, I call it from 8 to 10 or 12 mile breeze; it is not what we call a—we just call it a light breeze.

Q. Then from Potlatch at 6 o'clock in the morning until midnight you had nothing more than light breezes?

A. Yes.

Q. That is correct?

A. As far as I can remember, yes.

Q. At midnight where were you?

A. About a quarter or a half a mile west of Apple Cove Point.

Q. A quarter to a half a mile?

A. A quarter to a half a mile west of Apple Cove Point.

(Testimony of Arthur W. Nelson.)

Q. West of it?

A. Yes, I would call it west of Apple Cove Point.

THE COURT: East?

Q. You mean east, don't you?

A. West of Apple Cove Point.

THE COURT: You mean Apple Cove Point was west of you?

THE WITNESS: No, I was west of Apple Cove Point.

Q. Will you take a look at the map and get yourself straightened around?

A. This is westerly; this is easterly; westerly is here and I was here.

Q. You were north of Apple Cove Point?

A. We call it westerly—southwest—southwest—

MR. GORHAM: True or magnetic?

THE WITNESS: I was about here.

Q. Make an "A" there—

MR. GORHAM: On Exhibit "4."

Q. —on Exhibit "4," where you were at 12 o'clock.

A. About here.

Q. Make a figure "A" there.

A. About in this position here; there is a dock in here; just abreast of the dock.

(Testimony of Arthur W. Nelson.)

Q. You were about the point where the red round mark is of your letter "A"?

A. Yes.

Q. Northwesterly of Apple Cove Point?

A. Well, I would have to steer to clear Apple Cove Point pretty near east from the position I was.

MR. GORHAM: That is magnetic?

THE WITNESS: Yes.

Q. At that time you turned in?

A. About ten or fifteen minutes after twelve.

Q. When did you awaken?

A. Well, we must have been about a mile and a half—

Q. What time?

A. About I think it was pretty close to 2 o'clock or somewhere around 2 o'clock.

Q. Where were you then?

A. We was about southeast of—about a mile and a quarter or a mile and a half southeast of Jefferson Head, as far as I could judge in the dark.

Q. Do you mean Jefferson Head or President Point?

A. Jefferson Head is the last shore.

Q. Well, I asked you, was it Jefferson Head or President Point?

A. I said Jefferson Head is where we generally pull up to for the last.

(Testimony of Arthur W. Nelson.)

Q. Now at that time what was the weather?

A. It increased to a I would call it a breeze approximately forty, thirty-eight to forty miles an hour, what I would judge over the little experience I have had.

Q. To about how much?

A. A thirty-eight to forty mile breeze.

Q. Thirty-eight to forty?

A. Yes.

Q. Can you compute it as close as two miles?

A. No; just approximately I said.

Q. How long did you stay up there?

A. About an hour.

THE COURT: When was this; what time?

THE WITNESS: In the morning between two and three.

MR. COSGROVE: I asked him, I believe, when he awakened, which was 2 o'clock.

THE WITNESS: About.

Q. About 2 o'clock or ten or fifteen minutes after?

A. Something; I couldn't exactly remember, but it was in the neighborhood of 2 o'clock.

Q. You got up at 2 o'clock and you turned in ten or fifteen minutes after?

A. I was up an hour or so.

(Testimony of Arthur W. Nelson.)

Q. You turned in at midnight ten or fifteen minutes after 12 o'clock?

A. I turned in at midnight.

Q. But at 2 o'clock you staid up until about three?

A. About 3 o'clock.

Q. What was the weather between two and three?

A. Well, as I said, it blowed what you call a local gale or a heavy squall.

Q. Did it continue for the full hour?

A. No.

Q. Well, how much of that hour did it continue?

A. The biggest part of the hour.

Q. What do you mean by that; fifty-one minutes?

A. I could not judge—I didn't watch the time exactly.

Q. I mean thirty-one minutes; that is the biggest part.

A. Well, I could not say exactly.

Q. An hour is sixty minutes. Have you any idea better than the largest part of it?

A. The wind began to recede before I—

Q. Did you have a clock?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Was it running?

A. Yes.

Q. Were you looking at it?

A. Occasionally, yes.

Q. Were you marking down your time—

A. No.

Q. —and positions?

A. No.

Q. You did not mark that down or anything? Do they do that on your boat?

A. They do mostly, yes.

Q. That is the general rule, you mark down your positions—

A. Yes.

Q. —as you go from one point to another?

A. Yes.

Q. Do you mark down in your log any unusual circumstance?

A. Any unusual happenings, yes.

Q. Do you mark down unusual weather?

A. Well, if it comes that anything will happen to me, yes.

Q. Well, even if something does not happen to you do you mark down unusual weather?

A. Well, I didn't mark down that.

Q. Well, do you usually?

(Testimony of Arthur W. Nelson.)

A. At times if I see that I am in any danger or anything that is out of the way I do.

Q. Yes, if you think you are in any danger or anything out of the way you mark it down in the log book?

A. Yes.

Q. If you don't think you are in any danger or anything unusual you don't mark it down in the log book?

A. No. It is a habit I should not practice, but I still did it and didn't mark it down.

Q. What is that?

A. It is a practice that I should not continue, but I didn't mark it down at the special time.

Q. Well, other times you mark down unusual weather?

A. When I leave and arrive at certain points.

Q. Well, I asked you, on other occasions when you are handling barges such as this and you meet with any unusual happening you mark it in your log?

A. I never met with anything like this before.

Q. Did you never meet with any weather such as this before?

A. Never that anything happened like this.

Q. I didn't ask you about anything happening.

(Testimony of Arthur W. Nelson.)

I asked you, did you ever meet with any weather like this before?

A. Not so uncertain, no.

Q. What?

A. Not so uncertain, not so unexpected as this.

Q. What do you mean by that, that you got warning in advance, that somebody wrote you a letter that you were going to get a blow?

A. As a rule we watch the barometer and it will tell hours ahead.

Q. Did you have a barometer on this vessel?

A. Yes.

Q. Did you look at it?

A. Yes, we did.

Q. Did you make any readings?

A. No.

Q. You didn't mark it down or anything?

A. No.

Q. Don't you usually mark that down?

A. Well, at times we do.

Q. You did not mark anything down in this log, did you?

A. No.

Q. All you have in this log is your beginning and your ending, isn't it?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. All right. Now we have got up to 3 o'clock. At that time the weather moderated?

A. Yes.

Q. By that what do you mean; what had it come to be at that time?

A. The wind decreased in velocity.

Q. I understand, but to what extent had it decreased; had it come down to the ten or twelve miles again that it was?

A. To twelve to fifteen miles.

Q. And at this time you turned in at 3 o'clock in the morning?

A. Yes.

Q. And the weather was down to twelve or fifteen miles, I believe you testified that at that time the barge was riding well?

A. Yes.

Q. Had the barge ridden well all the way down?

A. Yes, as far as I could observe.

Q. It rode well all the time until you turned in at 3 o'clock?

A. Yes.

Q. Just the way it usually rides?

A. Yes.

Q. During this time did the cargo keep its position on the barge?

(Testimony of Arthur W. Nelson.)

A. I could not see in the dark.

Q. You could not see. As far as you knew it was all right?

A. Evidently.

Q. During this time did the barge sheer from one side to the other?

A. Well, to a certain extent.

Q. That sheering was nothing unusual up until 3 o'clock, was it?

A. It was quiet before; there was no sheer to the scow before the wind began.

Q. I say up until 3 o'clock there was no sheer, was there?

A. Well, during the wind there was a sheer, there was a certain amount of working on the scow.

Q. That was not very much, was it, that sheer?

A. I could not say.

Q. You could not say?

A. No.

Q. Well, between 2 and 3 o'clock did you notice any sheer?

A. To a certain extent.

Q. To a certain extent; how much do you mean by that?

A. Well, I could not say. There was shifting of the lights back and forth in the dark but that is all I could observe.

(Testimony of Arthur W. Nelson.)

Q. Well, was that anything unusual in a breeze of that kind?

A. Yes, it is unusual in a sea.

Q. I asked you, was that unusual in a breeze of that kind?

A. I can't quite understand you.

Q. Well, you had been out with a barge with cars on it before, hadn't you, in a breeze?

A. Yes.

Q. Did the barge sheer any then?

A. Well, at times in sheering off certain swells hit it.

Q. If you got a certain lot of swells at other times you got sheers with your barge?

A. Yes.

Q. You know what a sheer is, don't you?

A. Yes, I quite understand.

Q. Do you recollect having sheers before with this same barge?

A. Not to the extent of this here.

Q. What was the difference in the extent; how could you figure that extent?

A. I could figure on account of the wind and sea and tide working against it, what I could figure.

Q. I think you said the barge was riding normally all the time, didn't you?

A. Until the wind struck us, I said.

(Testimony of Arthur W. Nelson.)

Q. Did you let out your hawser?

A. I had out the full length what I had aboard.

Q. That is all you had; you had no more hawser?

A. About four hundred feet, as usual, that class of boats.

Q. What is the power of this tug?

A. A hundred horsepower, supposed to be.

Q. A hundred horsepower?

A. Yes.

Q. What kind of an engine?

A. Fairbanks Morse.

Q. What type of engine?

A. C. O.

Q. On the way down did you stop any place?

A. No.

Q. Did the engine run continuously—

A. Yes.

Q. —from Potlatch until the time of the loss?

A. Yes.

Q. It kept on the move all the time?

A. Yes.

Q. Now between two and three you travelled from a mile and a quarter to a mile and a half southeast of Jefferson Head to what point; where were you at 3 o'clock?

(Testimony of Arthur W. Nelson.)

A. Oh, about a mile and a half northwest of Meadow Point.

Q. Now I am referring not to the time of the loss. I am referring to the time when you turned in at 3 o'clock, where were you?

A. The position I really could not observe very well because it was pretty near black and I could not observe the conditions very much.

Q. You didn't know where you were then?

A. Oh, yes, I knew where I was, yes.

Q. Where were you?

A. I was between Meadow Point and Jefferson Head.

Q. Well, on what course were you travelling from Jefferson Head?

A. I was heading for Ballard Blinker.

Q. Well, when you got a mile and a quarter to a mile and a half southeast of Jefferson Head you put her on a course for the Ballard Blinker?

A. Yes.

Q. When you turned in then was that the course to be followed by the wheelsman?

A. Yes.

Q. And how far did you intend to go on that course?

A. Under Ballard.

Q. In to Ballard?

(Testimony of Arthur W. Nelson.)

A. Under Ballard shore.

Q. Under Ballard shore?

A. Uh huh.

Q. You turned in at 3 o'clock. Now what next—when did you awaken?

A. About between 3:30 and a quarter of four or ten minutes to four, something like that, between that time, I could not say exactly, I think it was something pretty close to ten minutes to four, 3:50 a. m. I think it was.

Q. You awakened?

A. Yes.

Q. Did you come up then?

A. Yes.

Q. And that is the time you say you saw West Point light and—or where you saw Alki Point Light and the bluffs of West Point in line?

A. Yes.

Q. How was the sea?

A. It was quite a sea running against the tide.

Q. Quite a sea?

A. Yes.

Q. That sea was still running when you got up—

A. Yes.

Q. —at 3:30 or 3:45?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. Was there a sea running at 2 o'clock?

A. It was not much of a sea, but the wind began to blow.

Q. When did the sea come up?

A. Oh, about a half an hour after the wind.

Q. It came up about two-thirty then?

A. About.

Q. You signed a protest, did you, Captain?

A. I think I did.

Q. I hand you Respondent's Exhibit "A-3," and ask you if that is your signature at the top—

A. Yes.

Q. —the first signature on the second page.

A. Yes, sir.

Q. You swore to that before Mr. Gorham?

A. I think I did.

Q. It is dated February 4, 1926. That is correct, is it?

A. I can't remember the date.

Q. Well, take a look.

A. Yes.

Q. Can you see it?

A. Yes.

Q. That is the correct date, is it?

A. I say I could not remember the exact date.

Q. The loss happened on the 3rd of February, 1926?

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. I am going to read you part of this: "That after said tug with said barge in tow had been at sea about twenty-two hours, namely, on the 3rd of February, 1926, at the hour of about 3:50 o'clock a. m., and while said tug with said barge in tow was off Meadow Point about one and one quarter to one and one half miles, the tide then flooding and the sea then being smooth, with a heavy swell running and a strong southerly wind prevailing, said barge under the influence of wind and sea spilled her cargo and said cargo became a total loss." Did you note the part of it there in which you stated that the tide was flooding, the sea was then smooth, a heavy swell running and a strong southerly wind prevailing; did you note that?

A. There is an error in that I believe, because the sea was running, but there was no whitecaps; what I would call a smooth rolling sea; that is the way I would express it; but there was no whitecaps when it was blowing.

Q. Then it was not a smooth sea, was it?

A. The sea can be smooth and rolling. I have been on the high seas.

Q. What is the error then?

A. It sounds I guess the way it is picked up

(Testimony of Arthur W. Nelson.)

that it is a smooth sea and a heavy southerly wind prevailing.

Q. You don't mean to say that Mr. Gorham would make a mistake? That is what you told him?

A. It may be a mistake by the best of men.

Q. Mr. Gorham would not make a mistake. You certainly must have given him that information.

A. It may be misunderstanding.

Q. Did you take any check at any time of the speed that you were making?

A. There is no device to take any check on the speed.

Q. Well, you knew the distances between points, did you not?

A. Yes, about.

Q. And you had a clock?

A. Yes.

Q. You had a chart, didn't you?

A. Yes.

Q. Did you make any computation of the time it took you to run between certain points?

A. I never was accustomed to measure the distances.

Q. You don't know what your speed was then on any given distance?

A. No, I could not say. It is very much variable, the speed.

(Testimony of Arthur W. Nelson.)

Q. How many hours does it usually take you to run between Potlatch and say this point off Meadow Point?

A. With loaded scow the way I had a loaded barge to Seattle, from Potlatch to Seattle, about twenty-three to twenty-four hours.

MR. COSGROVE: Where is that log of the Ketchikan?

MR. GORHAM: Here it is (handing).

Q. Let us take this particular voyage and when did you arrive in Seattle?

A. I rather think it was near 8 o'clock or a few minutes before eight.

Q. A few minutes before eight. Your usual time you say twenty-three or twenty-four hours?

A. Yes.

Q. What time does it usually take you between Potlatch and Seattle with this barge loaded with cars when you meet any weather?

A. Ordinary average time twenty-three to twenty-four hours with loaded barge.

Q. I am talking about not fair weather; I am talking about weather with some wind, some rough weather.

A. We have got to work on the tides a whole lot; if the tide we get the wave the right way with

(Testimony of Arthur W. Nelson.)

Q. How did he put them on; tell me that?

A. I can't get—quite understand you.

Q. Did he have anybody helping him?

A. He had his train crew.

Q. Did you assist in any way?

A. I was there, yes.

Q. Now the barge is a three track barge, isn't it?

A. Sir?

Q. The barge is a three track barge?

A. Yes, sir.

Q. And the cars were loaded onto the barge while she sat on a gridiron, were they not?

A. Yes.

Q. And land tracks ran to each of these tracks on the barge, did they not?

A. Yes.

Q. Did all of the cars come down in one train?

A. That is what I can't tell because I had no charge of that part of the work.

Q. Well, were they not backed on two at a time?

A. Yes.

Q. Which two were put on first, which track?

A. I could not remember.

Q. You don't remember?

A. No, sir.

(Testimony of Arthur W. Nelson.)

Q. There were two on each track, were there not?

A. Yes.

Q. You don't know which cars were put on first?

A. No, I could not remember exactly.

Q. Were the cars backed on with the brakeman on the barge or a member of the train crew on the barge?

A. No, that is something I had no charge of; I had nothing to do with that part.

Q. Well, did you see it?

A. I stood on the barge.

Q. What did you see?

A. I saw the locomotive and the train crew put them on the barge.

Q. Well, you didn't have anything to do with the putting of them on, did you?

A. Not with the working of the locomotive, no, only what I had to do was to tell the conductor where to put them.

Q. What did you tell him now?

A. To load them.

Q. Well, what did you tell him where to put them? You said that was your business. What did you tell him?

(Testimony of Arthur W. Nelson.)

A. Just put them, I said, where they were best fitted to be loaded.

Q. But you left that to him?

A. Yes.

Q. To put the cars on whatever way he saw fit?

A. The best way he could load it to be—the best way to load it.

Q. You left that to him then?

A. Well, that is all I could do. I could not control the locomotive crew.

Q. You did not tell him to put any one car any particular place or anything of that sort?

A. Well, there was only one way to load it.

Q. I say, did you tell him to put any car in any particular place on the barge?

A. There was only one way to load it. It was a heavy locomotive crane, an empty gondola and four loaded cars that we didn't know the actual weight of, just by guess.

Q. You could not tell which were the heavy cars or the lighter cars, could you?

A. No.

Q. You didn't know whether the contents of one would weight ten tons and another twenty tons, did you?

A. About the material there I am not in a position to be a judge of it.

(Testimony of Arthur W. Nelson.)

Q. That was heavy camp construction equipment, wasn't it, the contents of these cars?

A. It was none of my work to—

Q. Couldn't you see what was on the cars?

A. No; it was none of my business.

Q. Couldn't you see?

A. It was none of my business to observe anything that was on the cars.

Q. Oh, well, now let us be honest about this thing. Couldn't you see anything that was on any of those flat cars; did you see anything on those flat cars?

A. It was camp equipment, yes.

Q. All right. Now let us be honest and quit fooling then. What was on those flat cars that was camp equipment; what kind of stuff was it?

A. I didn't pay attention to it.

Q. You didn't see it at all?

A. Yes; it was camp equipment, but what it was I had no real reason to observe.

Q. Was there a donkey boiler on any of them?

A. That is more than I could tell.

Q. Did you see a locomotive crane?

A. Yes.

Q. Did you tell anybody where to put the locomotive crane?

A. Yes.

(Testimony of Arthur W. Nelson.)

Q. What did you tell them?

A. To spot the cars even on the head end.

Q. Yes, but did you tell this train crew, this conductor, where to put the locomotive crane?

A. Yes.

Q. What did you tell him?

A. To put it on the middle track.

Q. And he ran these cars then on the tracks and after they were put on did you have any blocking prepared for them so that they ran the cars against the blocking—

A. Yes, sir.

Q. —or did you do the blocking afterwards?

A. I had certain blockings before they were put on.

Q. Oh, you set the blockings before?

A. Certain blockings, yes.

Q. Some of the blocking?

A. Yes.

Q. You did some of the blocking afterwards?

A. Yes.

Q. Now, Captain, let us take the outside track on the starboard side; what timber, if anything, were on that end of the scow or that end of the barge?

A. On the stern end what I would call it where

(Testimony of Arthur W. Nelson.)

the bumper was I had timbers to space the cars to balance it the best condition I could.

Q. Well, you had a head log—

A. Yes.

Q. —across the after end of this barge?

A. Yes.

Q. What size was that?

A. I think it was a twelve by sixteen and then there was an additional twelve by twelve I think it was in front of that.

Q. Well, you don't know whether it was twelve by twelve or twelve by sixteen, that head log, do you?

A. There was one twelve by sixteen bolted, first bolted, and then in front of it was a twelve by twelve.

Q. That twelve by twelve did that run clear across the deck—

A. Yes.

Q. —from starboard to port?

A. Yes.

Q. Was that fastened to anything?

A. It was fastened to the scow—to the barge.

Q. How was that fastened?

A. I can't just remember how that was fastened.

Q. As a matter of fact that was loose, wasn't it?

(Testimony of Arthur W. Nelson.)

THE COURT: That was the twelve by twelve?

MR. COSGROVE: Yes.

Q. Wasn't that twelve by twelve loose?

A. I couldn't say that was loose, but it was there.

Q. Don't you know as a matter of fact that that was loose?

A. I couldn't say as to that.

Q. How long had it been on there?

A. Now that is more than I could really say, the exact time.

Q. Had it been on there any length of time?

A. I believe since I began to handle the barge.

Q. Now the rails ran clear up to these two logs you are talking about?

A. Yes.

Q. And the rails were nailed to the decking, were they?

A. As far as I can remember, yes.

Q. Now how high were the rails, Captain?

A. I think they were four and a half inches high, four and a half or five inches high.

Q. They were fastened to the deck with ordinary railroad spikes, were they?

A. As far as I can remember, yes.

Q. Well, you saw the rails taken off afterwards, didn't you?

(Testimony of Arthur W. Nelson.)

A. No, I didn't see that.

Q. You didn't see that?

A. No.

Q. Going to the outside now, the outside track from the starboard side, you had a head log you say twelve by sixteen inches bolted and you had a twelve by twelve in front of that?

A. Yes.

Q. How close did the car wheels come to the twelve by twelve?

A. There was space to the best of my knowledge to balance the cars, put them as far on the head end of the barge as possible.

Q. That is what I am trying to get at, Captain. How close were the nearest wheels to that twelve by twelve?

A. I can't remember just exactly, but there were some timbers, two or three or more between there, but I couldn't just exactly remember how many, but there was space.

Q. What kind of timbers were there?

A. There was 8 by 8s and 6 by 8s I think it was.

Q. Were they railroad ties?

A. They were square timbers.

Q. Well, were they railroad ties?

(Testimony of Arthur W. Nelson.)

A. That is more than I could tell. They were timbers. They could be used for ties or anything.

Q. Different sizes?

A. There was 8 by 8s and as a matter of fact there was all kinds of timbers on that scow besides these.

Q. But you used 8 by 8s and 6 by 8s?

A. Yes.

Q. And you ran these across the rails?

A. Yes.

Q. You laid them down on the rails?

A. Yes.

Q. And against each other?

A. Yes.

Q. And against the twelve by twelve?

A. Yes.

Q. And against the wheel?

A. Yes.

Q. And you don't know how many there were of those?

A. No, that is what I—It was just to take up space.

Q. There were several of them anyway.

A. Yes.

Q. There might have been a half dozen do you think?

(Testimony of Arthur W. Nelson.)

A. No; there was not many because the space would not allow that much.

Q. You just fitted them in between the twelve by twelve and the wheels?

A. Before the cars were put on the barge.

Q. Oh, before. Did you have any other blocking at that end of the car, I mean on this outside starboard track?

A. There was in the fore and aft under the journals.

Q. On the after end?

A. The after end, wedged in.

Q. You are positive of that, are you?

A. Yes.

Q. Now what did you have on the port track; how were those cars blocked?

A. The same thing.

Q. In the same way?

A. The same.

Q. Now let us take the after end of the middle track, the track where the crane and the gondola car were.

A. Yes.

Q. How did you block those cars on the after end?

A. The locomotive crane was about approxi-

(Testimony of Arthur W. Nelson.)

mately within eight or ten feet—I could not just exactly remember the space—from the bumper.

Q. By the bumper you mean that twelve by twelve timber—

A. Yes.

Q. —that ran across next to the bolted timber?

A. Yes, sir.

Q. Eight or ten feet?

A. Yes, sir.

Q. And what did you have in between the twelve by twelve and the car wheels?

A. There was a timber across in front of the wheels and then a short timber between the two tracks next to the timber close to the locomotive and the same kind of a timber to fill up the space what was between the tie, this twelve by twelve, and the deck and the height of the rails, about four inch, what I would call a pillow, the timbers.

Q. I am afraid I didn't understand you. Now between the tie which was under the wheels and the twelve by twelve you had another tie or timber laid on the deck between the rails?

A. There was one athwartship next to the tie or timber what was against the wheels and then I think it was four inch or four and a half, whatever it was, that filled the space in between the rails, and another one the same height next to this twelve by

(Testimony of Arthur W. Nelson.)

twelve, and then there was fore and aft two timbers against the timber what was against the wheels, wedged in there.

Q. Here is a piece of paper having lines drawn on it. You may consider the two inside lines the inner track, the middle track. Will you take a pencil and draw the head log? We will consider this the barge.

MR. GORHAM: Is that drawn to scale?

MR. COSGROVE: Yes.

MR. GORHAM: 90 by 36?

MR. COSGROVE: Yes.

A. (Witness drawing) That is the timber. This is the wheels here. This is the wedges. These are timbers. This timber here is on top of this here. Here this underneath here to hold this and then wedged in here, and then here is wedges underneath each corner.

Q. Now just a moment. The portion of this diagram which is bounded by the letters A, B, C, D, represents what?

A. This is the bumper twelve by sixteen.

Q. That is what is sometimes called your head log?

A. Yes.

Q. All right. Now I will ask you what the

(Testimony of Arthur W. Nelson.)

part which is bounded by the letters B, F, G, D represent?

A. I could not say how that was fastened.

Q. What does it represent?

A. Twelve by twelve.

Q. A timber twelve by twelve?

A. Twelve by twelve.

Q. And the line H J what does that represent?

A. A timber across the front of the wheels of the locomotive crane.

Q. By that you mean it was under or behind the aftermost wheels of the locomotive crane?

A. Yes.

Q. Now we come to the line K L, what does that represent?

A. Timbers extending from the twleve by twelve up against the timber under the wheels of the locomotive crane.

Q. You say that is timber or timbers?

A. Timbers; two of them, one of them on each side.

Q. I only refer to this particular one?

A. That is one timber.

Q. That is one timber. That lay on the deck, did it?

A. It was about four and a half or five inches off the deck, the height of the rail. It was either

(Testimony of Arthur W. Nelson.)

four or four and a half inches square and to take the space, to give the same height, full face, to support there.

MR. GORHAM: That is what; a cross tie under the wheel?

THE WITNESS: Yes.

Q. What is this line M N?

A. That is what I say, just four by four or four and a half by four, the same height as the rail, pretty close, to give these timbers full support against the timber.

MR. GORHAM: To give which timbers; the fore and aft timbers?

THE WITNESS: The fore and aft timbers full support against these timbers.

Q. What does that lie on?

A. On the deck, this short timber between the rails.

Q. That is between the rails?

A. Between the rails.

Q. And athwart ship?

A. Yes, athwart ship.

Q. Then the timber K L was the timber between the rails near the right hand or starboard rail butting against that twelve by twelve—

A. As close to—

Q. —on one end and resting on M N—

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. —did it rest on M N?

A. It rested on both ends.

Q. It rested on this small one here?

A. Yes.

Q. And against H J?

A. Yes.

Q. Now on the port side there was a similar timber?

A. The same thing.

Q. Did you have a small timber between the rails near the twelve by twelve, as you had up here at M N?

A. The same thing.

Q. O and P represent what; wedges?

A. Wedges.

Q. And K N was eight to ten feet long?

A. I could not say exactly.

Q. I think that was what you said, wasn't it?

A. Something like that, yes. The exact length I could not say.

Q. What size was this M N here?

A. About the height of the rail, four or four and a half inches.

Q. What was the size of K N?

A. Eight by eights.

Q. I assume from the wedging here that the

(Testimony of Arthur W. Nelson.)

crane was run on and all this blocking fitted in after the crane was run on?

A. Yes.

Q. Did you have to cut these pieces K N?

A. Fit them.

Q. You had to cut them after the crane was run on to make it fit?

A. To make it fit.

Q. Now at the other end of these tracks what did you have for blocking?

A. Timber across facing the wheels.

Q. Clear across the rails?

A. Clear across the rails.

MR. GORHAM: You are now referring to the stem of the barge?

MR. COSGROVE: Yes.

A. (Continuing) This is the head end of the barge now. Timber across in front of the wheels with timber fore and aft on each side.

Q. Wait a minute. This timber across the rails was what size?

A. I could not exactly remember; eight by eight or six by eight, something like that.

Q. And you had just one of those under the wheels?

A. Yes.

Q. And then you had a timber—

(Testimony of Arthur W. Nelson.)

A. Fore and aft.

Q. —on each side in addition to that?

A. Yes.

Q. How were they placed?

A. Placed under the journals.

MR. GORHAM: The journals of the car?

THE WITNESS: Yes.

Q. And over this transverse piece?

A. Yes, and wedged up.

Q. Where did you put the wedges?

A. Between the two timbers and if there was any chance I drove—I couldn't remember if it was wedged here under each end, under there, fore and aft, too.

MR. COSGROVE: I offer this in evidence.

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: Respondent's "A-5".

(Drawing referred to admitted in evidence and marked Respondent's Exhibit "A-5".)

Q. Did you sound this barge before you took her away from Potlatch?

A. She was drained when I left her on the gridiron, drained herself.

Q. She drained herself?

A. Yes.

Q. What do you mean by that?

(Testimony of Arthur W. Nelson.)

A. Through the valves and through the plugs what there is on the barge through the bottom.

Q. Well, she was loaded the afternoon of the 2nd, wasn't she?

A. Yes.

Q. And you sailed the next morning at 6 o'clock?

A. Yes.

Q. Did you sound her the next morning?

A. She was dry; yes.

Q. Did you take her off the night before or that morning?

A. She was at low tide about midnight.

Q. Low tide about midnight?

A. Yes, when I put the plugs in and closed the valves.

Q. That was done at midnight?

A. Yes, about midnight. I don't—

Q. When you pulled her off the next morning you had plenty of water over the gridiron?

A. Yes.

Q. How high was the water then on the barge?

A. Well, I left there early on the tide as soon as she floated. The tide that morning I think—

Q. Did you sound her that morning?

A. I could not remember if I did or not.

(Testimony of Arthur W. Nelson.)

Q. Is it your practice to sound her before going off?

A. It is not the practice because I always drain her before I put the plugs and close the valves.

Q. You have been carrying cars on car barges for some time, have you, Captain?

A. Yes.

Q. Had you at this time, February 3rd, 1926, been towing car barges or Chesley No. 1?

A. Before that, yes.

Q. Had you?

A. Before that time, yes.

Q. Did you set the brakes on these cars?

A. It was not my business of doing that.

Q. I asked you, did you set the brakes?

A. No.

Q. Did any of your crew set the brakes?

A. No, not what I recollect.

Q. What is that?

A. Not what I can remember.

Q. Did anybody else set the brakes?

A. That was the train crew's work.

Q. Did you see anybody else set the brakes?

A. I saw the conductor handle the brakes.

Q. Of course I know you can't see anything that is not your business, but did you see anybody set the brakes?

(Testimony of Arthur W. Nelson.)

A. I saw the conductor handle it.

Q. You saw the conductor himself set the brakes?

A. Yes, because I stood close by.

Q. What brakes did he set?

A. That is—there is only certain brakes on the car.

Q. All right. What brakes did he set on the starboard cars?

A. The hand brakes I suppose it was.

Q. Well, you saw him, didn't you?

A. Yes.

Q. Did he set both of them?

A. Well, there is only one hand brake on each car.

Q. Did he set each brake on the port side?

A. Apparently to me he did, yes.

Q. What is that?

A. Apparently to me what I saw him working he did.

Q. Well, did you stop to watch to see whether he did?

A. No.

Q. You don't remember whether he did or whether he did not, do you?

A. I don't understand.

(Testimony of Arthur W. Nelson.)

Q. Do you remember whether you saw him set the brakes on the port side?

A. The same as he did on the starboard side.

Q. Did you see him?

A. Well, I was on the barge.

Q. Were you watching to see whether he did it?

A. Now I could not exactly remember at this very present time, but to my recollection he did.

Q. At this present time I am talking about now, if you remember.

A. To my recollection he did.

Q. Do you recollect him setting these brakes?

A. Yes.

Q. Did he set the brakes of the middle cars, of the cars on the middle track?

A. There was a hand brake of the locomotive what I believe that I remember of him setting.

Q. You remember him setting that?

A. Yes.

Q. Did he set the hand brake of the gondola?

A. Of the gondola.

Q. Did he set the hand brakes of the locomotive crane?

A. Yes.

Q. You are sure of that now?

(Testimony of Arthur W. Nelson.)

A. I am sure he was working around the brakes.

Q. You are sure he set one on all these cars?

THE COURT: Working around what?

THE WITNESS: Working around the brakes.

Q. You are sure he set hand brakes on all these cars?

A. Well, that is what he was working around.

Q. All right. Did you see him set the hand brake of the locomotive crane too?

A. He was working around the brake.

Q. I asked you, did you see him set it; did you see him turn it and set it?

A. Well, that is the action he did. I could not say.

Q. As Captain of this tug in charge of this barge don't you take any pains when you are towing a barge of cars to see whether or not the brakes of the cars are fastened?

A. Well, it was the train crew done the work.

Q. I asked you, don't you take any pains to see whether they are or are not fastened?

A. My duty is to block them and spot the scow at each end of the journey and handle her while she is in transportation.

Q. Then it is not your duty to see anything about the brakes?

(Testimony of Arthur W. Nelson.)

A. Not particularly.

Q. You don't always pay attention then to see whether or not the train crew did set the brakes or not?

A. Well, I could not say, but I saw the conductor working around the brakes.

Q. What were you doing meanwhile?

A. I stood on the barge close by.

Q. You were doing the blocking, weren't you?

A. No, not while they were loading.

Q. Well, after you got the cars loaded you had to do the blocking for the center cars, didn't you?

A. No.

Q. You said a moment ago that after the crane was put on that you did that blocking on the after part—

A. Oh, yes, after the train crew was through with their work.

Q. The conductor in setting these brakes, do you remember which one he set first?

A. I could not remember exactly.

Q. Did he get up on the cars and walk from one car to the other?

A. No, I could not, because it was all kind of material on them; it was none of my duty to go up on top.

(Testimony of Arthur W. Nelson.)

Q. These cars were the usual railroad flat cars, weren't they, all except the gondola?

A. The gondola. I think the whole works was gondolas.

Q. What is that?

A. I think the whole thing was gondolas.

Q. What do you mean? A gondola has sides on, hasn't it?

A. Yes.

Q. You think they were all gondolas?

A. I think there was some gondolas; I could not say, but as far as I remember, there was some gondolas.

Q. You think there was more than one?

A. I could not exactly remember whether there was or not. I had no business on top of the cars.

Q. Well, the fellow who was fastening these brakes, did he move from one car to the other on top of the cars; did you see him walking back and forth?

A. He walked on the barge from one car to the other as far as I can remember.

Q. Did he walk on the outside or between the cars?

A. Well, he could walk on either side of the cars, either side of the cars for that matter. That is what I could not say.

(Testimony of Arthur W. Nelson.)

Q. When it came to fixing the brakes of the center cars did he walk between those cars and the cars on the outside tracks?

A. I can't just exactly remember.

Q. Did the vessel have any list; did the barge have any list the next morning?

A. About four inches.

THE COURT: Which way?

THE WITNESS: To starboard.

THE COURT: That would be away from the trough if she sheered in the trough?

THE WITNESS: Apparently when we got into the wind it was on the—I would call it on the weather side, because the wind was coming more southerly; we steered about southeast by south I think it was.

Q. How was she fore and aft?

A. About a foot.

Q. A foot—

A. On the head end.

Q. You mean a foot high?

A. Yes.

Q. That means a foot down by the stern?

A. Yes.

Q. How do you recollect that?

A. Well, I had a stick before I left, took a stick and measured from the deck to the water;

(Testimony of Arthur W. Nelson.)

well, by my judgment I judge it was about twenty inches, perhaps twenty-two inches from the water, the low corner.

THE COURT: That is where?

THE WITNESS: On the stern end.

Q. Twenty inches?

A. Twenty to twenty-two inches about from the water.

Q. You mean to the water?

A. Yes; the deck from the water.

Q. Captain, didn't you think it your duty to go and see whether those brakes were set before you left with that barge?

A. It was not particularly my duty. My duty was to block them and look after the navigating part of the boat and handling the barge.

Q. Do you remember on March 30, 1926, at Potlatch, meeting Mr. Hermann, the gentleman that was on the stand a bit ago and myself?

A. I recollect two gentlemen come down to the barge that I had on the gridiron with Mr. Hillyer, Superintendent of the Phoenix Logging Company, but I could not say, I could not remember exactly the day; I could not positively swear to who they were.

Q. You don't recognize me as one of the men who was there?

(Testimony of Arthur W. Nelson.)

A. It may have been or may not because there was so many at times.

MR. COSGROVE: Stand up, Mr. Hermann.

(A gentleman stood.)

Q. Do you recollect seeing this gentleman there at that time?

A. I may and may not. I could not say for sure.

Q. But you remember two men—

A. Two men, yes.

Q. —there on the afternoon of that day with Mr. Hillyer, the representative of the Phoenix Logging Company; you remember two men—

A. Yes.

Q. —on that day talking to you? Did you not tell us at that time that on the middle track there were three pieces of eight by twelve loose laid on the car tracks in front of the head log?

A. No. That is a misunderstanding I believe.

THE COURT: Laid how?

MR. COSGROVE: Laid across the car tracks in front of the head log.

Q. Do you remember telling us at that time that butting against these loose timbers was one eight by twelve laid lengthways of the scow in the middle of the car tracks?

MR. GORHAM: Which car tracks?

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: The middle car track.

A. I can't remember.

Q. Do you recollect telling us that?

A. No.

THE COURT: One eight by twelve laid how?

MR. COSGROVE: In the middle of the track.

THE COURT: The middle of the middle track?

MR. COSGROVE: Yes, butting against these loose timbers aft.

Q. Do you remember telling us that this single timber lying between the rails was butted forward against an eight by twelve laid across the rails under the wheels of the car?

A. I can't recollect exactly what—

Q. You don't recollect that?

THE COURT: Read that question again.

(Question and answer read.)

Q. Don't you recollect showing us that you only had one timber lying fore and aft between the rails aft of the aftermost car on the middle track?

A. I don't think I exhibited any timbers on the very same time.

Q. What is that?

A. I don't think I exhibited any particular timbers.

Q. Didn't you tell us there was only one timber instead of two at that place?

(Testimony of Arthur W. Nelson.)

A. I could not—I don't remember to say—explaining anything there.

Q. You don't remember?

A. No.

Q. Are you sure now that you had two timbers?

A. I had two timbers; I am positive of having two timbers there wedged in.

Q. Then if you told us you only had one you were mistaken?

A. I don't think I explained these things at this time.

Q. Don't you remember pointing out to us just exactly how you fastened these cars on this barge?

A. No. I was not on the stern end of the barge at all, if I remember right.

Q. You don't remember telling us anything about how you fastened the cars on the barge?

A. There was something mentioned, but I don't think I made no special—

Q. Do you remember telling us that across this top piece or across on top of this cross piece—I am referring to the middle track, the after most end—across the piece that was laid under the wheels you laid under the journals of the car other pieces, one end resting under the journals and the other end—

(Testimony of Arthur W. Nelson.)

and the timber sticking up over this piece on the rails, one under each journal of the aforemost car; do you remember telling us that?

A. I don't remember explaining all this what you at present mention.

Q. Do you remember telling us that the two loaded cars on each of the outside tracks rested directly against the loose timber next to the head log?

A. No.

Q. You don't recollect that?

A. No.

Q. Would you say that you did not say it?

A. I did not say it.

Q. You did not say it?

A. No.

Q. Do you remember telling us that there were no shores or timbers running from the car wheels or car bodies to the sides of the scow?

MR. GORHAM: What?

MR. COSGROVE: Shores or timbers running from the car wheels or car bodies to the sides of the scow, to the deck of the scow?

A. Any shores, no, I don't remember any shores.

Q. You didn't have any shores—

A. I don't think so.

(Testimony of Arthur W. Nelson.)

Q. —running up from the deck of this barge to the bodies of the cars?

MR. GORHAM: You mean upright shores?

A. No, there was none that I remember.

THE COURT: Vertically?

MR. COSGROVE: Yes.

A. (Continuing) There was none what I remember.

Q. You didn't have any, did you?

A. No, there was none what I remember.

Q. Did you have any wheel clamps?

A. No.

Q. Were the cars chained on in any way, any chains running from any part of the car to any part of the barge?

A. No.

Q. All the blocking that you had was the blocking that you have already testified to here today?

A. The blocking what was usually sent out from Seattle I used the same blocking, the same method.

Q. All right. That is something else new. We will get back to that in a minute. You didn't have any other blocking for these cars than that which you have mentioned today, did you?

A. The usual blocking, yes.

Q. Wait a minute now. Did you have any

(Testimony of Arthur W. Nelson.)

other blocking for these cars than that which you particularly mentioned today?

A. No.

Q. Now we will get back to this blocking that you say that you used that you say was sent out from Seattle. Do you remember telling us that you used whatever blocking they sent out from Seattle for you?

A. We used what we had before on those other cars.

Q. Do you remember telling us that it was not any of your business to go looking for blocking, that you took just whatever they gave you, whatever was sent out from Seattle?

A. Not what I remember. There was always enough on the barge.

Q. Do you remember telling us that, that it was not any of your business to go looking for blocking?

A. No, it was not my business either.

Q. Do you remember telling us that?

A. I may or may not.

Q. And that you used only that which they gave you?

A. There was always plenty on the barge.

Q. Do you remember telling us that a year or a year and a half previous to this Mr. Chesley had used on this same scow wheel clamps?

(Testimony of Arthur W. Nelson.)

MR. GORHAM: Used on the same scow what?

MR. COSGROVE: Wheel clamps.

A. I can't remember if I ever saw wheel clamps on the barge since I came there.

Q. Do you remember telling us that at the time of this loss the weather at that time and just preceding was not unusual, that you didn't know how much wind was blowing, that you could not have estimated it further than to say that there was not much of a wind; do you remember telling us that?

A. No.

Q. Do you remember telling us that an hour before the loss the wind had died down to such an extent that you turned in and you did not know anything of the loss until the man at the wheel called you?

A. No.

Q. Do you remember telling us distinctly that you, Mortensen and Mikelson—Mikelson was your cook, wasn't he?

A. Yes.

Q. —that you, Mortensen and Mikelson did all the blocking?

A. Mikelson had nothing to do with the blocking.

Q. Do you remember telling us that?

(Testimony of Arthur W. Nelson.)

A. No.

Q. Do you remember telling us that just before you turned in the last time that you observed the sea was smooth and the tide was half flood and the wind against you and the tug and tow were making excellent progress in the water?

A. No.

Q. You don't remember that?

A. No.

Q. Would you say you did not say it?

A. I don't remember saying anything like that.

Q. Would you say you did not say it?

A. I don't remember saying it.

MR. COSGROVE: That may not have been your business. That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. When these gentlemen came down aboard your barge or aboard the barge at Potlatch on or about March 30th, did they tell you who they were?

A. I could not remember—I think Mr. Hillyer introduced them, but I could not remember their names.

Q. Did they tell you that one represented the insurance company that had insurance on the cargo and the other was the attorney for the insurance company?

A. I don't think they did, if I remember right.

(Testimony of Arthur W. Nelson.)

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. Will you say positively that we did not?

A. Now, I could not remember exactly if you did or not.

Q. As a matter of fact, isn't that the first thing that we told you?

A. Mr. Hillyer was there.

Q. Isn't that the first thing that we told you?

A. I could not remember exactly.

Q. Well, will you deny that we told you that first?

A. No, I wouldn't deny it. I wouldn't say "Yes" or "No."

Q. Let us make this your business now whether we told you that or not. Did we?

MR. GORHAM: I will take Mr. Cosgrove's word if he did. I was simply trying to find out from this witness.

MR. COSGROVE: I say I did.

MR. GORHAM: That is satisfactory.

THE WITNESS: I think Mr. Hillyer introduced me to the men.

MR. GORHAM: I will take Mr. Cosgrove's word whether he did.

THE WITNESS: I think Mr. Hillyer introduced me to the men.

(Testimony of Arthur W. Nelson.)

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. Captain Nelson, when your barge is at Potlatch, it must rest on the gridiron before a car can move off or on, mustn't it?

A. Yes.

Q. And to put it on the gridiron you have got to have water to float it in place?

A. Yes.

Q. And sometimes you get there when you want to rest it on the grid before the tide goes out?

A. Oh, the tide has got to be higher on the grid.

Q. And what do you do then; open the valves and flood it?

A. And flood it?

Q. So it will sink down and rest on the grid?

A. Yes.

Q. And then after you have flooded the barge and it is resting on the grid it is then in the position so far as the ends of the rails ashore and the ends of the rails on the barge are concerned to take off and on cars?

A. Yes.

Q. And it is never in position to do that until it does rest on the grid?

A. It has got to rest on the grid.

Q. Now after you have flooded your barge so

(Testimony of Arthur W. Nelson.)

that it may rest on the grid at the particular stage of tide what do you do with that water inside the barge after that?

A. The valves is left open; I flood her and the plugs is usually pulled to flood her and they are left open until it has drained the water out of her.

Q. Now at what stage of tide is it drained?

A. Below the bottom of the barge.

Q. Below the top of the grid, isn't it?

A. Yes.

Q. And at low water is the level of the water below the top of the grid?

A. At times it is two or three feet.

Q. And always low water some inches below?

A. Yes.

Q. So that the water can all run out of the barge that you permit to come into the barge in order to submerge it?

A. Yes.

Q. It all drains out?

A. Yes.

Q. How do you know that the holes through which it is drained are not stopped up with some debris?

A. If they are stopped up I could not get the plugs back in place. From the deck there is long plugs reaching from the top of the deck about a

(Testimony of Arthur W. Nelson.)

foot above the deck and just the size—the hole the size of the plug, a little bit larger, and then the plug is tapered on the bottom and the hole is to fit the taper and you have got to have a clear hole or else go down in the barge to clear the hole to get these plugs fitted in from the top of the deck without any obstacles in it.

Q. The man stands on the deck of the barge to put these plugs in, doesn't he not?

A. Yes.

Q. And the plug runs through the hole in the barge down to the bottom of the barge?

A. Yes.

Q. And is fitted in the hole there?

A. Yes.

Q. From the top deck?

A. Yes.

Q. This estimate you have given of twenty to twenty-two inches, that is what you call the freeboard, isn't it?

A. Yes.

Q. The side of the barge out of water?

A. Yes.

Q. The Ketchikan is known as a semi-diesel engine, a semi-diesel tug boat?

A. Yes.

Q. And requires a crew of three?

(Testimony of Arthur W. Nelson.)

A. Yes.

Q. That is yourself, a second man and a cook?

A. Yes.

Q. And that is within the law, the navigation laws?

A. The law I think will allow two men.

Q. You don't have to have a Master's license to operate one of those, do you?

A. No.

Q. A permit?

A. No.

Q. You have a permit, don't you?

A. I have got a permit. I was never required to.

Q. What is the length of this vessel?

A. Sixty-five feet; sixty-four feet some inches.

Q. What is her beam?

MR. COSGROVE: You are referring to the tug?

MR. GORHAM: The tug, yes.

A. The beam I think is twelve feet some inches.

MR. GORHAM: That is all, if the Court please.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. Did you tell us whose business it was to replace the plugs?

A. Most of the time I done it myself.

(Testimony of Arthur W. Nelson.)

Q. Do you recollect who replaced the plugs on this barge on this particular night?

A. It was most my own work to take care of that.

Q. You don't answer my question at all. I asked you if you recollect who did it?

A. I think, if I ain't mistaken, we were both of us out that night, two, Mr. Mortensen and I.

Q. You are not sure?

A. I am pretty near positive we were both of us; oftentimes we were out.

Q. What is the freeboard of the tug?

A. Well, it depends on how much fuel she has got in her. If she is full laden with fuel she lays about a foot of freeboard from the guard.

Q. What was her freeboard at the beginning of this voyage?

A. Well, I think there was about twelve or fourteen hundred gallons of fuel in her at the time.

Q. I didn't ask you how many gallons of fuel. I asked you how much freeboard?

A. About a foot.

Q. About a foot?

A. I would judge about a foot.

Q. At the beginning of this voyage?

A. Yes, at the midships.

MR. GORHAM: Freeboard where; what part of the vessel?

(Testimony of Arthur W. Nelson.)

MR. COSGROVE: The lowest.

Q. Where would the lowest be?

A. It would be twenty-four to twenty-six feet from the stern.

Q. That freeboard would not change much on this voyage, would it?

A. Not much, no.

MR. COSGROVE: That is all.

REDIRECT EXAMINATION.

BY MR. GORHAM:

Q. If those plugs had not been put in at low water she would not float the next high water, would she?

A. No.

Q. She would fill again, wouldn't she?

A. Yes.

Q. And she did float—

A. Yes.

Q. —when you started on your voyage?

A. Yes.

Q. And that fact is evidence that the plugs were all set in their proper places, isn't it?

A. Yes.

MR. GORHAM: That is all.

THE COURT: Were there any marks on the barge to show how this load went off?

THE WITNESS: After, yes, I observed there

(Testimony of Arthur W. Nelson.)

was from the wheels after it had left the rails there was cut in a kind of an angle towards the after starboard corner, two on the—I think it was two on the—

THE COURT: Two marks on the twelve by sixteen to show that it went over the stern?

THE WITNESS: I didn't see it.

MR. COSGROVE: That obliges me to ask him another question.

RECROSS EXAMINATION.

BY MR. COSGROVE:

Q. The next morning was the twelve by sixteen there?

A. No.

Q. When you got to Seattle was the twelve by sixteen there?

A. There was only a little part of the twelve by sixteen, just a little corner.

Q. Where was that?

A. Hanging on to one of the bolts.

Q. Hanging on to one of the bolts?

A. Yes.

Q. Which way were the bolts bent?

A. Part of them—well now I could not say exactly, but most of them were bent aft and to starboard.

Q. And some of these wheel tracks that you say you saw went directly aft, didn't they?

(Testimony of Arthur W. Nelson.)

A. Well, I don't remember exactly. I think they all showed a little angle toward the starboard corner.

Q. Didn't some of them go directly aft?

A. No, I couldn't say. What I saw of it the next morning, what I remember, it showed creases leaning toward the starboard corner, the starboard after corner.

MR. COSGROVE: All right.

(Witness excused.)

MR. GORHAM: May we have three or four minutes?

THE COURT: We will interrupt the trial with ex partie matters.

(A brief intermission.)

THE COURT: Mr. Gorham and Mr. Cosgrove, how many more witnesses will you have?

MR. GORHAM: I have one more witness in my case in chief, who is not here, and I am going to ask the indulgence of the Court and counsel to put him on later.

(Discussion.)

THE COURT: The Court will be at recess 10 minutes.

(Recess.)

MR. GORHAM: If the Court please, we have to get one witness, Mr. Thompson, who is a witness

on valuations of locomotive cranes. He was here yesterday. I asked him to come back this morning. I have not seen him today, and I ask the indulgence of the Court that I may call him out of order if he comes in sometime during the morning.

THE COURT: Any objection?

MR. COSGROVE: No.

MR. GORHAM: Otherwise we rest.

MR. COSGROVE: A stipulation has been filed in this matter and has been referred to heretofore, a stipulation for the consolidation of these two cases and the amendment of Respondent's article three of the separate and affirmative defenses. Interrogatories were attached to the answer in the Chesley case, answers have been returned, and in the Guthrie case, answers have been returned, and in the Guthrie case the stipulation includes this paragraph which I will ask to read into the record: (Reading)

> "That the interrogatories and answers to interrogatories propounded and returned in said Cause No. 5539"—which is the Chesley case—"shall be considered interrogatories and answers to interrogatories in this cause with the same force and effect as if propounded and returned herein."

You stipulate that I may read that into the record?

MR. GORHAM: Yes.

MR. COSGROVE: At this time I would like to read the interrogatories and the answers. Mr. Gorham, if it is agreeable, I will read the questions and you read the answers. Will you do that?

MR. GORHAM: Yes, if you want, or you may read them all.

MR. COSGROVE: Introducing the questions and answers into evidence.

(The proctors read interrogatories and answers thereto, and proceedings were had thereon, as follows):

"INTERROGATORIES PROPOUNDED TO LIBELLANT TO BE ANSWERED BY ONE OF ITS OFFICERS UNDER OATH:

Interrogatory No. 1:

"When was the barge Chesley No. 1 built, give her construction, tonnage (gross and net), and dimensions."

Answer to Interrogatory No. 1:

"Built in 1913.

Construction—Wooden barge with 5 solid bulkheads and 5 trusses.

Tonnage—193 gross and net.

Dimensions—90'x36'x7'.

Custom House Measurement—90'x36'x7' 8" over all."

Interrogatory No. 2(a):

Please list all of the voyages of said barge

between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded."

MR. GORHAM: That is a subdivision, isn't that, of that?

Interrogatory 2, subdivision (a).

MR. COSGROVE: Subdivision (a). I am willing, Mr. Gorham, that we may read that later and go on with the others.

THE COURT: Read it in argument, do you mean?

MR. COSGROVE: Beg pardon?

THE COURT: You propose to read it in argument?

MR. COSGROVE: No. I propose to read this one later on in the trial. It is a long listing and for the time being we can skip it.

MR. GORHAM: If you want to. It is your case.

(Continuing reading.)

Interrogatory No. 2(b):

> "Please give the name of the tug towing said barge on each of said voyages, give also the name of the then owner and master of each of said tugs."

Answer to Interrogatory No. 2(b):

> "Names of tugs, their owners and masters, towing on said voyages, are as follows:

Tug Ketchikan II.

Owners: Libellant.

Master: Nelson.

Address, care Libellant.

Tug Tempest.

Owners: Libellant.

Master: McDevitt, now deceased.

Tug Lillico, No. 20.

Owner: Lillico Tug & Barge Co.

Master: Bert Thomas.

Address: Unknown."

Interrogatory No. 2(c):

"What weather did said barge encounter on each of said voyages?"

Answer to Interrogatory No. 2(c):

"Unknown to Libellant."

Interrogatory No. 2(d):

"Did barge take water on any of these voyages? If so, what voyages, and how much water and under what circumstances?"

Answer to Interrogatory No. 2(d):

"Not to Libellant's knowledge."

Interrogatory No. 2(e):

"Did barge have to be pumped out during the period of November 1, 1925, to February 2, 1926? If so, when?"

Answer to Interrogatory No. 2(e):

"Not to Libellant's knowledge."

Interrogatory No. 2(f):

"Did said barge have to be pumped out on any of said voyages? If so, upon what voyage, and when, and by what means was said pumping accomplished? How long did each of said pumping operations take?"

Answer to Interrogatory No. 2(f):

"Not to Libellant's knowledge."

Interrogatory No. 2(g):

"Please produce at the trial of this action the original log books covering said voyages of each of the tugs towing said barge upon said voyages, attach hereto the copies of all entries in said log books relating to said voyages giving the names and addresses of persons making such entries."

Answer to Interrogatory No. 2(g):

"Log book of KETCHIKAN II from January 16, 1926, to February 2, 1926, and log book of tug TEMPEST from November 9, 1925 to February 2, 1926, now at office of proctor for Libellant subject to inspection by Respondent and its proctor.

Present whereabouts of log book of tug KETCHIKAN II from November 1, 1925 to January 15, 1926, unknown to Libellant.

Names and addresses of persons making entries in said log books unknown to Libellant

except as follows: Names and addresses of Masters of KETCHIKAN II and TEMPEST given in Answer to Interrogatory No. 2(b)."

Interrogatory No. 3:

"When was barge last caulked prior to February 2, 1926, what was the extent and character thereof, and by whom and where done?"

Answer to Interrogatory No. 3:

"October, 1923, by Maritime Boat & Engine Works, Seattle, Washington.

Extent and character, see Answer to Interrogatory No. 4."

Interrogatory No. 4:

"When and where was said barge last on drydock prior to February 2, 1926? For what purpose was she on such drydock, and what was thereon done to said barge?"

Answer to Interrogatory No. 4:

"October, 1923. Hauled, scraped, cleaned, scrubbed, and copper painted bottom; took out nine planks in bottom and replaced, caulked and cemented seams; put on four planks and guards for chafing strake head end; took out piece of head log and replaced with new; took off rails and put on sheathing and replaced rails; took off rake guards and replaced; made new plug, took off, straightened and replaced corner irons;

made new combing around hatches forward end; hawsed in and filled seams, and caulked where found necessary."

Interrogatory No. 5:

"What collisions, strandings or accidents befell said barge during or upon any of said voyages, or during said period of time, give detailed statement of effect thereof upon her hull, timbers and caulking?"

Answer to Interrogatory No. 5:

"No collisions, strandings or accidents."

Interrogatory No. 6:

"What was done by way of hull repairs to said barge during said period, when and by whom?"

Answer to Interrogatory No. 6:

"No hull repairs other than as shown in Answer to Interrogatory No. 4, except incidental repairs from time to time as occasion required."

Interrogatory No. 7(a):

"Of what did the cargo of the barge consist on the voyage beginning February 2, 1926, at Potlatch, Washington, if it consisted of railway cars how many were there, what sizes and weights, and with what were they loaded; what was the approximate total weight of said cars and other cargo?"

Answer to Interrogatory No. 7(a):

"Locomotive crane on its own wheels, weight .... 63 tons

5 railway cars, weight each........................ 20 tons

1 car, empty

1 car, containing goods, weight, exclusive of car .... 42 tons

1 car, containing goods, weight exclusive of car .... 19 tons

1 car, containing goods, weight exclusive of car .... 8 tons

1 car, containing goods, weight exclusive of car .... 38 tons"

Interrogatory No. 7(b):

"How and where were said cars placed on said barge? The term 'cars' used in this interrogatory includes said crane and idler."

Answer to Interrogatory No. 7(b):

"Crane and idler (empty railway car) placed on center track.

Two railway cars on each outside track."

Interrogatory No. 7(c):

"How were they fastened or secured to said barge in order to prevent their rolling or shifting?"

Answer to Interrogatory No. 7(c):

"Across the after end was a 4x16 timber with a 12x12 timber on top bolted to the barge with several 1″ bolts and four 1½″ anchor bolts

with 6′ washers on them, in front of that another 12x12 timber, and in front of that, between that 12x12 timber and the wheels of the cars, would be usual railroad ties which were about 7x9 or 8x8 timber to fill in the space between the 12x12 timbers and the wheels of the car. On the other end of the scow we used timbers or a railroad tie across the track and another 8x8 timber or railroad tie under the journals of the car wedged in place with ship wedges, on each side."

MR. COSGROVE: There is a further answer to this particular interrogatory.

MR. GORHAM: Yes; we ask to have the further answer served and filed. The further answer of Libellant to the interrogatory is as follows:

(Reading)

"That said railway cars and said crane and idler car were further fastened or secured to said barge as follows:

Said locomotive crane on its own wheels coupled to said idler car was placed on the center track of said car barge and against said 7x9 or 8x8 timbers, said idler car being forward of the crane; and the brakes of all said railway cars and said idler car, as spotted on said car barge, were set by air and by hand."

MR. GORHAM: The inference of that is and

we intend it shall be our statement as far as we know that the brakes were not set on the locomotive crane itself; it only refers to the four cars on the two outside tracks and the idler.

MR. COSGROVE: The understanding as I had it from Mr. Gorham was that the effect of that was an agreement that the locomotive crane was not braked.

MR. GORHAM: As far as we knew at the time and as far as I know now. Mr. Foote, the conductor, who braked them all, is here and he will speak for the fact. I have not asked him about it.

MR. COSGROVE: I take it that the answer to the interrogatory is that it was not fastened—not braked.

MR. GORHAM: As far as we know. We are only answering to our own knowledge. If the fact is different I presume the Court wants the fact. So far as we know now that is the true answer, if the Court please.

(Continuing reading.)

Interrogatory No. 7(d):

"Were said cars secured with shores?"

Answer to Interrogatory No. 7(d):

"No."

Interrogatory No. 7(e):

"Were said cars secured with jacks?"

Answer to Interrogatory No. 7(e):

"No."

Interrogatory No. 7(f):

"Were said cars secured with rail clamps?"

Answer to Interrogatory No. 7(f):

"No."

Interrogatory No. 7(g):

"If your answer is that said cars were secured with shores, jacks and or rail clamps, please describe the same, and state how many there were and where placed."

Answer to Interrogatory No. 7(g):

"See above."

Interrogatory No. 8(a):

"Please produce at the time of trial the original log book of the tug Ketchikan II, showing all voyages made by the said Ketchikan II during the period of November 1, 1925, to and including February 4, 1926, and attach hereto copies of all entries in said log books relating to any and all of said voyages.

Answer to Interrogatory No. 8(a):

"See answer to Interrogatory No. 2(g)."

MR. GORHAM: Those log books so far as we had them were in my possession subject to the inspection of the Respondent and its proctors in my office and they were submitted to him before trial.

(Continuing reading.)

Interrogatory No. 8(b):

"Upon said voyage beginning February 2, 1926, was said barge manned? If so, how, and by whom; did it have any pumping equipment of its own?"

Answer to Interrogatory No. 8(b):

"Barge not manned. No pumping equipment of its own."

MR. COSGROVE: We offer those questions and answers in evidence.

THE COURT: Admitted.

MR. GORHAM: Including the list of voyages that I did not read.

MR. COSGROVE: Yes, we consider them—

MR. GORHAM: Read.

MR. COSGROVE: —read in evidence.

MR. GORHAM: As attached to my answers on file.

MR. COSGROVE: Yes. That is Interrogatory No. 2, subdivision (a). I give that to the stenographer.

MR. GORHAM: Yes, that is right.

(Interrogatory No. 2(a) and the answer thereto are here copied into the record as follows:)

Interrogatory No. 2(a):

"Please list all of the voyages of said barge between November 1, 1925, and February 2, 1926, giving the ports of sailing and destination, dates of sailing and with what cargo loaded."

Answer to Interrogatory No. 2(a):

"Voyages of Chesley No. 1 between November 1, 1925, and February 2, 1926, ports of departure and destination, dates of sailing and cargoes, are as follows:

SCOW CHESLEY NO. 1—Nov. 1st, 1925, to Feb. 3rd, 1926.

1925	Date					
No.	Depart.	Arrival	Cargo	From	To	Tug
2598	11-4-9 A.M.	11-5-6 A.M.	4 cars	Seattle	Potlatch	Tempest
	11-6 A.M.	11	3 cars	Potlatch	Seattle	Tempest
2610	11-8-1 P.M.	11-9-3 P.M.	4 cars	Seattle	Potlatch	Ketchikan
	11-10-11 A.M.	11-10-10:20 P.	4 cars	Potlatch	Seattle	{ Ketchikan V. Grubb
2616	11-12-11:30 P.	11-13	2 cars	Seattle	Mud Bay	Tempest
	11-15-7 P.M.	11-16-7 A.M.	1 car	Mud Bay	Seattle	Tempest
2625	11-17-Noon	11-18	2 cars	Seattle	Potlatch	Tempest
	11-19-4 A.M.	11-20-2 A.M.	2 cars	Potlatch	Seattle	Tempest
2643	11-26-1 A.M.	11-26-11 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	11-27 P.M.	11-28 P.M.	4 cars	Poulsbo	Seattle	Ketchikan
2653	11-29-1 A.M.	11-29-6 A.M.	4 cars	Seattle	Poulsbo	Ketchikan
	12-3	12-4-11:30 A.	4 cars	Poulsbo	Seattle	Tempest
2664	12-6-6 A.M.	12-7-7 A.M.	1 Loco.	Seattle	Dry Creek	Tempest
			3 cars	Dry Creek	Potlatch	Tempest
	12-9-10 A.M.	12-9-11 P.M.	4 cars	Potlatch	Seattle	Tempest
2674	12-11-1 A.M.	12-12-Noon	3 cars	Seattle	Dry Creek	Tempest
	12-13-3 A.M.	12-13-P.M.	0 cars	Dry Creek	Seattle	Tempest
2677	12-15-3 A.M.	12-16-5 P.M.	6 cars	Seattle	Dry Creek	Tempest
	12-17-5 A.M.	12-17-9 P.M.	3 cars	Dry Creek	Seattle	Tempest

2687	12-19 P.M.	12-20-7 P.M.	5 cars	Seattle	Potlatch	Tempest
	12-23 P.M.	12	4 cars	Potlatch	Seattle	Tempest
2708	12-28-2 P.M.	12-29-6 A.M.	3 cars	Seattle	Dry Creek	Tempest
	12-30-5 A.M.	12-30-6 P.M.	3 cars	Dry Creek	Seattle	Tempest
2709	12-31-11 A.M.	1-1 A.M.	3 cars	Seattle	Dry Creek	Tempest
	1926					
1926						
No.						
	1-1 P.M.	1-2 P.M.	3 cars	Dry Creek	Seattle	Tempest
25	1-3-1 P.M.	1-4-2:30 P.M.	6 cars	Seattle	Mud Bay	Tempest
	1-6-11 A.M.	1-7-12:20P.M.	Empty	Mud Bay	Seattle	Ketchikan
31	1-29-2 A.M.	1-29-7 A.M.	4 cars	Seattle	Port Orchard	Ketchikan
	1-29-4 A.M.	1-29-7 P.M.	0 cars	Port Orchard	Seattle	Ketchikan
32	1-7-11 P.M.	1-9-1 A.M.	5 cars	Seattle	Potlatch	Lillico No. 2
	1-9-10 A.M.	1-10-2 A.M.	0 cars	Potlatch	Seattle	Lillico No. 2
33	1-14-4 A.M.	1-15-6 A.M.	4 cars	Potlatch	Seattle	Ketchikan
34	1-17-6 A.M.	1-18 A.M.	6 cars	{ Seattle { Potlatch	{ Potlatch { Dry Creek	Ketchikan Ketchikan
	1-20-9 A.M.	1-22-1 A.M.	4 cars	Dry Creek	Seattle	Ketchikan
35	1-25-2 A.M.	1-26	6 cars	Seattle	Potlatch	Ketchikan
	1-27-11 A.M.	1-28-4 A.M.	4 cars	Potlatch	Seattle	Ketchikan
44	1-31-8 A.M.	2-1 A.M.	6 cars	Seattle	Potlatch	Ketchikan
	2-2-5:30 A.M.	2-3-8 A.M.	5 cars 1 Loco. Crane	Potlatch	{ Lost off { Meadow Point	Ketchikan

WILLIAM J. MOLONEY, called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COSGROVE:

Q. Captain, what is your business?

A. Surveyor to the Board of Marine Underwriters.

Q. At what point?

A. Seattle.

Q. That is what Board; who is the Board of Marine Underwriters that you speak of?

A. Well, the Board of Marine Underwriters consist of a number of insurance companies who have banded together to form a company where they can have men that have knowledge of ships and repairs to ships and different equipment on ships, to be in a position to advise them as to risks and losses and general marine work.

Q. Is that Board local?

A. No; it is in—San Francisco is the headquarters. They have representatives in each port on this side.

Q. On the Pacific Coast?

A. On the Pacific Coast.

Q. You are the representative at Seattle?

A. Yes.

Q. What seafaring experience have you had?

(Testimony of William J. Moloney.)

A. About a little over thirty years.

Q. What has been its character?

A. Well, I have been Master of everything from a tub boat to a transport.

Q. Where?

A. All over the world.

Q. Do you hold an American license?

A. I hold an unlimited Master's license for steam and sail vessels.

Q. All oceans?

A. All oceans.

Q. How long have you been engaged in the surveying business?

A. I have been permanently employed by the Board of Marine Underwriters for eight years. I had a temporary appointment previous to that covering about seven years before that; altogether about fifteen years.

Q. Have you had any navigating experience on Puget Sound waters?

A. Yes; I hold a pilot's license on Puget Sound waters and tributaries.

Q. Have you ever had any experience in those waters actually navigating vessels?

A. Oh, yes; I have sailed sailing vessels on Puget Sound from Seattle to sea, from Hoods Canal to sea, Port Gamble and Port Townsend to sea; I

(Testimony of William J. Moloney.)

have run a tug boat in practically all ports of Puget Sound.

Q. Hauling barges?

A. Yes, I have towed barges.

Q. Have you made any computations of distances from Potlatch on Hoods Canal this way?

A. Yes.

Q. What is the mileage from Potlatch to Appletree Point?

MR. GORHAM: Apple Cove Point.

Q. (Continuing) Apple Cove Point, a quarter mile off?

A. I think it is fifty-three miles.

Q. What is the distance between Foulweather Point and Apple Cove Point?

A. I will have to refer to my notes on that; I don't remember just the exact distance. I have got some notes on it.

Q. You heard the testimony here as to the approximate point of this loss?

A. Yes.

Q. What is the distance from Potlatch to that point?

A. Fifty-nine and a quarter miles.

Q. What is the distance between Apple Cove Point and the point of loss?

A. I think it is six and a quarter miles.

(Testimony of William J. Moloney.)

MR. GORHAM: How much?

THE WITNESS: Six and a quarter.

Q. What is the distance between Apple Cove Point and President Point, if you remember?

A. I think it is three and a quarter. Those distances we could measure them all. I am not quite sure. They may be a little bit out one way or the other.

(Chart shown to Mr. Gorham by Mr. Cosgrove and conference between respective proctors.)

Q. I have here a chart; will you state what it is?

A. This is a chart of Puget Sound, Seattle, No. 6460; it is Seattle to Olympia is the sub-heading under it.

MR. COSGROVE: We offer that in evidence.

MR. GORHAM: No objection.

THE COURT: Admitted.

THE CLERK: Respondent's No. "A-6."

(Chart referred to admitted in evidence, marked Respondent's Exhibit "A-6", and placed on easel.)

MR. COSGROVE: It is just a continuation.

Q. You heard the testimony of one of these witnesses this morning relative to Blake Island?

A. Yes, part of it; not all of it.

Q. Does Blake Island show on this last exhibit?

A. Yes, Blake Island shows on that.

(Testimony of William J. Moloney.)

Q. Will you point it out so the Court may see where it is?

A. Blake Island shows on the upper portion of this Seattle to Olympia chart at this point here (indicating).

Q. Captain, what computation, if any, did you make of the time it took the Ketchikan to run from Potlatch to Apple Cove Point beginning at Potlatch at 6 o'clock and arriving off Apple Cove Point at 1:30?

A. At 1:30?

Q. Yes, at what rate of speed?

A. It figures out about 2.72 miles per hour.

MR. GORHAM: 2.72?

THE WITNESS: Yes, 2.72 miles per hour.

Q. And assuming the loss to have taken place at 3:30, what was the rate of speed between Apple Cove Point and the point of loss?

A. She made almost three miles an hour from Appletree Cove to the point of loss.

Q. Do you know the Ketchikan II?

A. Just in a general way; I have seen her and been aboard of her.

Q. You have heard the testimony as to what kind of a vessel she is?

A. Yes.

Q. What power she has—

(Testimony of William J. Moloney.)

A. Yes.

Q. —the kind of engines she has, her length and so forth? You have heard the testimony as to the size of this barge—

A. Yes.

Q. 90 feet by 36 feet by 7 feet 8 inches, and you have heard the testimony as to what she was loaded with?

A. Yes.

Q. You heard the manner of her loading?

A. Yes, in a general way I have knowledge of the way she was loaded.

Q. You heard Mr. Mortensen testify as to how it was loaded?

A. Yes.

Q. And you heard how Captain Nelson testified as to her loading?

A. Yes.

Q. And you heard the interrogatories as to the manner of loading?

A. Yes.

Q. I will ask you. Captain, if in your opinion the locomotive crane should have been braked?

A. Yes.

Q. In your opinion was the—

MR. GORHAM: Don't lead the witness. He

is an intelligent man. Ask him what was necessary to be done.

Q. You heard the testimony, Captain, as to the boom on the crane, how the boom was stowed?

A. I did.

Q. And the testimony as to the turn-buckles?

A. Yes.

Q. What in your opinion would be the effect, naturally expected effect, of such stowage of said crane, having in mind the boom being placed above the gondola sixteen inches and fastened with turn-buckles, as the testimony shows?

A. There would be a tendency there for that turn-buckle to slack up and the crane, that is the boom part of the crane, to bang from one side of the gondola to the other, causing a general loosening up of the whole equipment on the middle track, and then eventually the gondola and the crane itself would have a tendency to slide to the lower end of the barge.

MR. GORHAM: How is that?

THE WITNESS: The gondola car and the crane, the locomotive crane, with the loosening up of the blocking on the track it would cause the gondola car to slide down towards the lower end, towards the head log.

MR. GORHAM: We move to strike that. That

(Testimony of William J. Moloney.)

is not responsive to his question. There is no hypothetical question about the blocking getting adrift.

THE COURT: Motion denied.

Q. You heard the testimony as to the blocking, the testimony of Captain Nelson as to the blocking of the crane and the gondola car?

A. Yes.

Q. In your opinion was that proper or improper blocking?

A. It was improper blocking.

Q. What are your reasons for so stating?

A. The first reason I should give would be in regard to the gondola car, it being, as I understand, of a weight of sixty-eight tons, there should have been special effort made to secure that gondola car individually irrespective of—the locomotive crane rather, irrespective of the gondola car.

THE COURT: Then you don't mean gondola? You mean crane?

THE WITNESS: I mean the locomotive crane, yes, sir. Special attention should have been paid to securing the locomotive crane, it being so much heavier equipment than the rest of the barge load.

Q. What do you mean by special attention; what particular things should be included in the way of special attention?

A. Well, that crane being on the middle track,

(Testimony of William J. Molo
and it is much shorter—it wa
feet long and the car would ap
feet long—forty feet long, th
sixty-eight feet—would allow a
ninety foot barge; it would lea
more, and those two pieces of eq
had more attention in blocking
relatively heavier than the sid
have been.

Q. What kind of blocki
used?

A. Well, I should have b
the ties would have been suffici
had been spiked to the deck
there would have been no chan
loose with the vibration. Then
motive crane, should have bee
deck upward, shored up so as t
of the springs of the locomotive

(Testimony of William J. Moloney.)

as to take a slight portion of the weight
crane off the springs of the car and that wo
vent any side motion or side working of the
tendency to loosen up the other fastenings.

Q. Suppose I hand you respondent's
"A-1"; it may be that you can show th
what you mean through the use of the dra

A. From that point there, Your Honor
neath the sill of the car to the deck of th
there should have been some shores fitted
take the weight off of it and then that st
vibration of these springs in the car and
solid.

Q. In your opinion was the fastening
boom proper or improper?

A. The boom should have been lower
and made fast to the gondola car after two
had been placed on the barge. Previously o

(Testimony of William J. Moloney.)

of gravity being two and a half feet forward of the center of the deck of the locoomtive crane, what effect, if any, would have been a distribution of weight on the wheels of the locomotive?

A. Well, it would be very small; it would make very little difference. The main danger would be not the loss of the center of gravity, but the danger of the swinging of the boom and by that way loosening up the blocking.

Q. What in your opinion was the blocking aft of the locomotive crane; I refer to the timbers aft of the locomotive crane; was that proper blocking?

MR. GORHAM: I don't think that counsel ought to put such categorical questions to this witness.

THE COURT: That calls for a "Yes" or "No" answer. I sustain the objection.

MR. GORHAM: The witness is an intelligent man. He knows his business I think.

THE COURT: Of course it is a preliminary question. It can be followed up and if he says it is improper he can point out and say in what respect it is improper.

MR. COSGROVE: That is exactly what I intended to do.

THE COURT: I sustain the objection. You can ask him, if he states it is improper, to state in

(Testimony of William J. Moloney.)

what respects, then we can get it all in one question. We don't need just a "Yes" or "No" answer.

Q. Referring to the blocking after the wheels, Captain,—I mean the wheels of the locomotive crane —will you state whether or not in your opinion that was proper or improper blocking and state why in giving the answer which you do give.

A. The blocking as stated by Captain Nelson previously was six by nine or six by eight or eight by eight. In my opinion that was too small for the locomotive crane. There should at least have been four or five blocks of ten by twelve in there and those fastened so that they would be one unit and could not work out.

Q. Any other reasons?

THE COURT: What dimensions did you mention?

A. About ten by twelve, Your Honor, and they should be fastened securely so that there would be no chance of them working out, and then also that car should have been wedged up from the deck and shores fitted then underneath of the couplings to prevent the car moving forward. There is not so much danger on this particular barge of the car moving forward because it had a down hill tendency towards the lower end of the barge, there was not so much danger of it running up hill, as we might

(Testimony of William J. Moloney.)

say, but there would be a danger of it running down hill if the blocking on the lower end had got loose.

Q. Would it be possible for the forward end of the barge to become lower at any time than the after end?

A. No, not with relation to the way those weights were put on the car unless the barge had suffered a collision or become water logged and then the forward end might get lower than the after end.

Q. In your opinion, Captain, was the blocking of the cars on the outer tracks proper or improper, and please state your reasons for your answer?

A. It was improper because the blocking was not fastened and whenever I go down to pass on any of these barges loaded with cars I always insist that that blocking between the wheels and the head log or the bumper log as some people call it shall be spiked, made fast, so that it is one unit. In that way I mean if there is five or six or seven pieces of wood in between the wheels of the car and the bumper log I insist that that would be all spiked together with battens and spiked to something substantial connected with the barge. In that way when it is in a sea-way there is no chance of that blocking between the wheels and the bumper log working loose, but if they are put in there just dropped in there there is always a tendency with a little vibration and rolling for them to work out.

(Testimony of William J. Moloney.)

Q. Was the method or lack of method of blocking the bodies of these cars proper or insufficient and give your reasons?

A. Well, it was insufficient because the blocking, as I have heard here, was not fastened.

MR. GORHAM: Because what?

THE WITNESS: Because the blocking was not fastened.

Q. I refer to the bodies of the cars.

A. And then the bodies of the cars were not shored. All railroad equipment when it is transported by water it is a requirement of our office that the car bodies shall be shored up from the deck. The reason of doing that is to prevent a side sway of the cars. The cars all swing on their springs, sway on their springs. They get out in a sea-way, they will naturally sway on their springs the same as they will going over a hilly road, and any equipment that is not held up solid against this side-sway it is bound to work loose, so the way we get away from that is we fit shores from underneath the sill of the car to the deck of the barge; then those shores are set up strong with wedges so that a certain amount of the weight of the car is lifted off of the springs. In some of the larger car barges they have jacks for this special purpose that are just screwed up underneath the sill of the car.

(Testimony of William J. Moloney.)

Q. In your opinion, what was the sufficiency or insufficiency or propriety or impropriety of blocking forward of these cars and state your reasons for your answers.

A. I would like to distinguish between the blocking forward and the blocking aft. As a matter of fact, you mean the low end or the high end?

Q. I refer to the forward end, the end opposite the so called head log.

A. Well, the blocking on that end, as I understand from the testimony, consisted of shores underneath the trunnions of the car that were held in place by a railroad tie jammed underneath them and wedged up. Well, in my opinion there should have been chains fitted to hold those cars from any forward movement.

Q. Where would the chains be fastened?

A. Well, there is posts on the barge. They could be fastened around the posts on the barge. They could be fastened to the after tow-bits. There is numerous places on the barge where these chains could have been fastened to, or in fact on any barge.

Q. You heard Captain Brownfield's testimony as to sheer?

A. Yes.

Q. Assuming, Captain, the movement of this tug and tow from Apple Cove Point to the point of

(Testimony of William J. Moloney.)
loss at the rate you named a while ago, which I think was something like three miles per hour—

A. Yes, approximately three miles per hour; 2.70—a little better than two and three quarters.

Q. —what would you have to say as to the probability of this barge sheering?

A. I don't think that barge done any sheering to amount to anything, because she made very good time considering the power of the boat that was towing her. I might further state that a vessel that sheers around takes longer to tow a certain distance than one that follows straight.

Q. What would be the comparison as to the probability of sheer of this barge unloaded as against this barge loaded as she was?

A. Well, a barge light has got a greater tendency to sheer than a loaded barge. The wind will catch a light barge and she will start off on an angle, and the progress of the vessel when she gets out at say an angle of around thirty-five to forty degrees then she has got a tendency more to slow down the towing vessel until such a time as that sheer is overcome, then the barge will immediately start over in the opposite direction and run a little bit that way and she will gradually slow down her sheering something like the pendulum of a clock until she is following in the wake of the towing vessel again, then

(Testimony of William J. Moloney.)

she may run along straight for a mtater of ten minutes or fifteen minutes or two hours and then all at once she will start off again and make another sheer and that sheer works out gradually until it comes to nothing and it follows the vessel again, and in that way the vessel's sheering will slow down the towing vessel considerably.

MR. COSGROVE: Will you draw a line, Captain, on these exhibits, on these charts which have been put in evidence, between Alki Point and West Point bluffs; just draw a line projected on past the bluffs? Here is a red pencil; you can mark it with that.

(Witness marking.)

Q. What do you know about the winds and the seas in the early part of February, the usual and expected winds and seas in the early part of February on Puget Sound between Hoods Canal and Seattle; what are they?

A. Well, you might say that in February there is variable winds. February is considered a variable month. The winds will fluctuate from southerly around to northwest.

Q. Well, go on and further describe.

A. You may get a lot of wind up around Seattle here and then away down at Port Townsend you may have no wind at all; variable winds; they

(Testimony of William J. Moloney.)

are localized a great deal by the surrounding land; where there is high land the wind may be a little bit stronger in the channel, and where there are low lands it does not affect them so much.

Q. What is the normally to be expected spread of velocities of wind during the month of February?

A. Well, I would say the winds run from calms up to around thirty-five or forty miles an hour.

Q. What sort of seas in this particular area of Puget Sound may be normally expected during this month?

A. Well, it is very hard to say the sea. The sea will always be controlled more or less by the wind. A forty mile wind, southerly wind, will make a considerable sea in the lower regions of Puget Sound and a ten mile wind won't make any sea at all.

MR. COSGROVE: Let us have that protest.

Q. Suppose, for instance, we had this kind of weather at this particular point: one and one-quarter to one and one-half miles of Meadow Point, the tide then flooding, the sea then being smooth, with a heavy swell running and a strong southerly wind prevailing?

A. You could not have anything like that.

Q. Why?

A. Because it is an impossibility. You have

(Testimony of William J. Moloney.)

got to have one thing or the other. You have a smooth sea and no wind, but you can't have a smooth sea and a heavy swell and a strong breeze. The things are utterly at variance; you can't reconcile them any way.

Q. Would you compare, Captain, the weather which Mortensen testified to receiving between 1:30 and 3:30 on the 3rd of February with weather which might be expected in the month of February?

MR. GORHAM: Did you hear Mortensen's testimony?

THE WITNESS: Yes, sir.

MR. GORHAM: All right.

A. Yes, I think that weather was just about normal February weather; there was nothing unusual in it.

Q. Did you hear Nelson's testimony this afternoon?

A. Yes.

Q. Will you compare the weather recited by him for the same period with what might normally be expected in the month of February?

A. Why, I could not see any reason for changing my previous answer that the weather was just the normal February weather. There was nothing unusual, nothing more than to be expected anywhere on Puget Sound in that month.

(Testimony of William J. Moloney.)

Q. You heard the testimony of one of the witnesses this morning bringing a couple of barges of sand and gravel from about Olympia towards Seattle and one of them getting adrift and going aground on the south shore of Blake Island?

A. Yes.

Q. And that later he was able to get his barge off and he took the two of them in to Seattle?

A. Yes.

Q. Having in mind his testimony now what kind of weather in your opinion actually existed at that time?

MR. GORHAM: Where?

MR. COSGROVE: At the south end of Blake Island at the point where he took off his barge.

A. I would say if the Captain of the Prosper took his loaded barge in on the south shore of Blake Island to pick up another loaded barge which was ashore on there I would say the weather was unusually calm and smooth.

THE COURT: We will interrupt the trial at this time and it will be resumed tomorrow morning at 10 o'clock. You may adjourn court until tomorrow morning at 10 o'clock.

Further proceedings continued to 10 o'clock A. M., December 29, 1927.

(Testimony of William J. Moloney.)

December 29, 1927, 9:30 A. M.

Hearing resumed. Same parties present.

WILLIAM J. MOLONEY, a witness for respondent, recalled to the stand, testified as follows:

DIRECT EXAMINATION (Resumed).

BY MR. COSGROVE:

Q. Read the last question. (Question read.)

Q., By the Prosper you meant the Tempest, did you not?

A. The Tempest, yes.

Q. Did you make any calculation of distance between the south shore of Blake Island and the Canal locks?

A. Yes, sir.

Q. What is that distance?

A. Ten miles.

Q. And if the master of the Tempest left the south shore of Blake Island at three o'clock and arrived at the locks at six o'clock, did you arrive at the rate he was going?

A. That would make about three miles an hour, three hours; a little bit better than three miles an hour.

Q. Assuming that the weather at Bush Point, a southerly wind was blowing 35 or 40 miles an hour, at flood tide, one or two hours flood, in February, does it follow that the same or similar

(Testimony of William J. Moloney.)

weather was to be found at other points on the Sound—say at the point of this loss rather? Give your reasons for your answer.

A. In my experience I have found conditions on Puget Sound where there would be a fresh breeze of 24 or 30 miles an hour some places and practically a flat calm at others. That was my experience when I was sailing schooners.

Q. You didn't quite answer my question. Read the question. (Question read.)

A. No.

Q. Give your reasons.

A. The wind and sea are greatly controlled by the land adjacent. Some places where the land is higher you may find that certain winds will be stronger. Other winds—winds from other directions in that same location—it may be a flat calm underneath that point, and practically across the Sound be quite a wind blowing. Winds on the Sound are controlled largely by the adjacent lands.

Q. Suppose you had a five-minute breeze, at 36 miles, what kind of a wind or breeze would that be? What would that mean to a navigator?

A. Just call it a squall, wind squall.

Q. For what areas do such five-minute wind squalls cover the water?

MR. GORHAM: If he knows.

(Testimony of William J. Moloney.)

MR. COSGROVE: If he does not know he can say so.

A. How is that?

Q. What areas do those five-minute wind squalls cover in Puget Sound, if you know?

A. It might only cover the exact place. It might cover one place right here and another place two or three miles away. It might not be continuous.

Q. Now let us forget for a moment all the testimony of the cross examination of Mortensen and the captain on the captain on the blocking, submitted in the answers to interrogatories; assuming that this barge was loaded at Potlatch the 2nd day of February, in the afternoon, with a locomotive crane weighing 63 tons and a gondola car weighing 20 or 25 tons, a 25 ton gondola on the center track, the crane aft, five cars each weighing approximately 20 tons, one car containing some 42 tons, another one 19 tons, another 8 tons, another 38 tons, two of those cars being on each of the outside tracks, all of the cars being blocked by a hand block, the crane not being blocked at all, and the blocking being as follows: across the after end was a 4 by 16 timber with a 12 by 12 timber on top, bolted to the barge with several 1-inch bolts and four 1½-inch anchor bolts with 6-inch washers, on them in front of that another 12 by 12 timber, and in front of that timber, that 12